UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA); adv. 10-3211; adv. 10-03545; adv. 09--1480; adv. 10-05428

- x

In the Matters of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- x

LEHMAN BROTHERS INC.,

Debtor.

- -x

LEHMAN BROTHERS HOLDING INC.,

Plaintiff,

-vs-

UNITED STATES OF AMERICA

Defendant.

- -x

LEHMAN BROTHERS SPECIAL FINANCING INC.

Plaintiff,

-vs-

THE BANK OF NEW YORK MELLON CORPORATION, et al.

Defendant.

- -x

- x

PT BANK NEGARA INDONESIA (PERSERO) TBK

Plaintiff,

-vs-

LEHMAN BROTHERS SPECIAL FINANCING, INC. et al.

Defendant.

- x

WENDY M. UVINO,

Plaintiff,

-vs-

LEHMAN BROTHERS HOLDING, INC., et al.

Defendant.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

February 16, 2011

10:05 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re: Debtors' Motion of the Bank of Nova Scotia for Relief from the Automatic Stay [Docket No. 13889]

HEARING re: Debtors' Motion for Authorization and Approval of a Settlement and Compromise Among Lehman Brothers Holding Inc., Lehman Commercial Paper Inc. and Swedbank AB, New York Branch [Docket No. 14165]

HEARING re: Debtor Lehman Commercial Paper Inc.'s Motion for Order Approving a Settlement Agreement Among the Debtor, Greenbrier Minerals Holdings, LLC and Certain of its Affiliates, Midland Trail Resources, LLC and Dolphin Mining, LLC [Docket No. 14291]

HEARING re: Debtors' Motion for Authorization to Implement Alternative Dispute Resolution Procedures for Affirmative Claims of the Debtors Under Derivatives Transactions with Special Purpose Vehicle Counter parties [Docket No. 13009]

Adversary Proceedings: [Adv. Case No. 10-03211]

HEARING re: Debtor Lehman Brothers Holding, Inc. for a Letter of Request for International Judicial Assistance [Docket No. 29]

HEARING re: Motion of United States of America to Approve Letter of Request for International Judicial Assistance [Docket No. 31]

Adversary Proceedings: [Adv. Case No. 10-03545]

HEARING re: Motion of the Dante Noteholders to Intervene [Docket No. 9]

HEARING re: Motion of the Liquidators of Lehman Brothers Australia Limited Seeking to Intervene in the Adversary Proceeding Relating to Certain Swap Transactions [Docket No. 11]

HEARING re: Debtors' Motion for an Order Enforcing the Automatic Stay Against Greenbrier Minerals Holdings, LLC (Docket No. 9729]

HEARING re: Motion of Englewood Management LLC for an Order Directing Lehman Brothers Holdings Inc. to Release and Return Non-Estate Property [Docket No. 13063]

HEARING re: Debtors' Motion to Assume Certain Aircraft Lease Agreements and to Consummate Certain Related Transactions [Docket No. 3218]

HEARING re: Motion of Cascade Investment, LLC for Leave to Conduct Discovery of (1) the Debtors, and (2) JPMorgan Chase Bank, N.A. [Docket No. 12120]

HEARING re: Motion to Compel Congregation Machne Chaim to Respond to Rule 2004 Subpoena [Docket No. 13105]

HEARING re: Motion of U.S. Bank National Association as Trustee for the Structured Asset Securities Corporation, Series 2005-GEL2 for Relief from the Automatic Stay [Case No. 09-10137, Docket No. 11]

HEARING re: Motion of U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust, 2005-HE3 for Relief from the Automatic Stay [Case No. 09-10137, Docket No. 13]

HEARING re: Motion of Factiva, Inc., et al., to Compel Immediate Payment of Post-Petition Administrative Expense Claims [Docket No. 7102]

HEARING re: Motion of Fidelity National Title Insurance Company to Compel Compliance with Requirements of Title Insurance Policies [Docket No. 11513]

Adversary Proceedings: [Adv. Case No. 09-014801]

HEARING re: Defendants' Motion to Dismiss Adversary Complaint [Docket No. 4]

HEARING re: Motion of Travis County, Texas to File Proof of Claim After Claims Bar Date [Docket No. 10829]

HEARING re: Motion of Newport Global Opportunities Fund L.P. for an Order Pursuant to Bankruptcy Code Section 105(a) Compelling the Trustee to Execute an Affidavit of Lost Securities [Docket No. 4012]

HEARING re: Motion of Newport Global Opportunities Fund L.P. for Entry of an Order Authorizing Newport to File Under Seal the Motion for an Order Pursuant to Bankruptcy Code Section 105(a) Compelling the Trustee to Execute an Affidavit of Lost Securities and a Certain Exhibit Thereto [Docket No. 4013]

HEARING re: Motion of MainStay High Yield Opportunities Fund for an Order Pursuant to Sections 362, 541 and 105 of the Bankruptcy Code for Relief from the Automatic Stay to Remove Lehman Brothers Inc. as Agent and Granting Related Relief

[Docket No. 3614]

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P R O C E E D I N G S

THE COURT: I'm told that some people are involved in conversations, but we're going to proceed on the assumption that we can get something done and will not have a material delay in the proceedings.

MR. PEREZ: Good morning, Your Honor. Alfredo Perez on behalf of the debtors. Happy New Year's, first time I've been back this year.

THE COURT: It seems late to be saying that, but that's okay.

MR. PEREZ: All right. Your Honor, we have three matters that should go relatively quickly, and then the fourth matter is the matter that the Court's been informed of. The first matter is a motion to lift stay by Bank of Nova Scotia. We have an agreed stipulation that will be presented by Mr. Hackett.

MR. HACKETT: Brennan Hackett from Weil, Gotshal and Manges for the debtors. Good morning, Your Honor.

THE COURT: Good morning.

MR. HACKETT: The first matter is a motion of the Bank of Nova Scotia for relief from the automatic stay. It's Docket No. 13889. Bank of Nova Scotia seeks relief from the automatic stay and to foreclose on a mortgage on certain portions of a mall known as Towne Square Mall, located in Las Vegas, Nevada.

Now, the parties have stipulated to consensually

resolve Nova Scotia's motion. Bank of Nova Scotia is the administrative agent for a construction loan that's secured by portions of the Towne Square Mall. LBHI separately made a loan to Jeffrey and Jacqueline Soffer and it's secured by perfected first priority liens on certain other parcels located within Towne Square Mall and easements for their benefit. Now, the two pieces of collateral are separate and distinct.

Now, the Towne Square Mall is subject to certain easements for access utilities, construction, common area use rights, that benefit both pieces of collateral. So pursuant to the stipulation, the easements benefiting LBHI's collateral and Nova Scotia's collateral will not be modified, disturbed or extinguished by any foreclosure. So LBHI's rights won't be affected.

And Nova Scotia's agreed to file a subordination agreement in the public records of Clark County, Nevada, the local county, to that effect. And the subordination agreement's attached to the stipulation. I have a copy of the stipulation, Your Honor, if I can hand that up to you.

THE COURT: Please do. Thank you. Are you counsel for Bank of Nova Scotia?

MR. HOOK: I am not, Your Honor. Counsel --

MR. OLSEN: Your Honor, I am, if you have any questions. It's Matthew Olsen of Katten, Muchin, Rosenman.

THE COURT: I'm a little confused as to the interests

that you apparently have in this uncontested matter.

MR. HOOK: Your Honor, may I be heard?

THE COURT: I don't even know who you are, so sure, but everybody's welcome to be heard if it's relevant.

MR. HOOK: Good morning, Your Honor. Sorry to speak up in an uncontested matter. My name is Jonathan Hook. I'm with the law firm of Haynes and Boone. We represent Five Mile Capital, which has a beneficial interest in a certain mezzanine loan on this Towne Square Mall. And while I certainly may not be against any of the terms or conditions in the stipulation that probably would resolve the motion of Bank of Nova Scotia, we would like an opportunity to see the stipulation to see if it does, in fact, affect any rights that my client may have with respect to the underlying loan agreement and other interests in the property.

We just want to be able to see it, Your Honor, and if it does, we'd like an opportunity to be heard.

MR. OLSEN: Your Honor, if I may be heard?

THE COURT: Sure. Looks as if we're going to give the parties who are negotiating plenty of time to continue their discussions in the conference room.

MR. OLSEN: Your Honor, again, Matthew Olsen of Katten and Muchin on behalf of Nova Scotia.

File Mile, in my understanding, is a mezzanine lender that has a pledge of the equity of our borrower. They have no

direct interest in our collateral. They have no direct interest in the Lehman collateral. They had -- they were given notice of this motion and they didn't oppose it. This is the first we've heard of their interest. I don't think that their concern should be given any consideration at this time.

THE COURT: Is this the first that you've heard that Haynes and Boone represents Five Mile Capital and has an interest in seeing the stipulation?

MR. OLSEN: It is not the first time I've heard Haynes and Boone represents Five Mile. It is the first time I heard that they have an interest in seeing the stipulation. But Haynes and Boones' attorney --

THE COURT: Well, here's how I'm going to deal with this. This was listed as an uncontested matter, and this agenda has been publicly available. The fact that this motion for stay relief was to be heard today has been publicly known, and the response deadline was February 9 at 4:00 p.m.

To the extent that Five Mile Capital wished to reserve its rights to speak to the stipulation or to take a position with respect to the motion for stay relief, it should've filed something before February 9, 2011 at 4:00 p.m. or should've obtained an extension of the response deadline, or otherwise done something to protect its rights to appear and take our time.

Accordingly, I'm going to completely disregard the

interruption. I'm going to approve the stipulation as uncontested. But I'm going to request that counsel for Bank of Nova Scotia, as a matter of civility and cooperation, share a copy of the stipulation with counsel for Five Mile, so that counsel can confirm that the stipulation does not, by its terms, impact the interest of its client.

MR. OLSEN: Happy to, Your Honor, thank you very much.

THE COURT: Okay. The stipulation is approved.

MR. OLSEN: Thank you, Your Honor.

MR. PEREZ: Thank you, Your Honor. The next matter is a motion to compromise with Swedbank, Your Honor. Swedbank and Lehman had entered into a -- several -- a repurchase agreement pursuant to which several loans were, in fact, repo'd to Swedbank.

It turned out, Your Honor, as of the filing, that there were several loans in which Lehman and Swedbank had different interests in the capital stack of the various projects. Pursuant to this agreement, we're doing several things.

First, we're exchanging properties so that Lehman will have all of the interests in one set of properties, Swedbank will have the interest in the other set of properties. Because of the fact that the amounts, the relative values of the properties are not identical, we're also making a payment of ten million dollars.

Additionally, Your Honor, Swedbank will have a deficiency claim in both the LCPI and the LBHI case of 325 million dollars, which is about a forty percent reduction from the 567 million dollar deficiency claim that they had found.

Furthermore, with respect to several other properties, we've either agreed to take no action, and there is one property in Austin that will have its loan extended for a two-year period.

Your Honor, Mr. Fitts filed a declaration in support of the motion, basically attesting to the business judgment with respect to the motion. He is in the courtroom to the extent that anyone needs to cross-examine him.

Prior to filing the motion, we had extensive discussions with the creditors' committee. Since the filing of the motion, we've had extensive discussions, both with the creditors' committee, as well as the ad hocs, LDI and Lehman Re. As a result of that, Your Honor, we have made the -- our kind of standard form of order contains a reservation of rights with respect to the debtors, and with respect to the interest of the debtors among themselves, and with respect to third parties.

As a result of the discussions that we've had, we've inserted three additional paragraphs in the order dealing more broadly with the reservation of rights; one, a generic paragraph, and then two, directly related to the potential --

the interest of Lehman Re and the potential interest of LBI.

Your Honor, I have a form of -- a black line of the order if the Court wishes to see it.

THE COURT: I would like to see it. Thank you.

Okay. What more do we need to say about this?

MR. PEREZ: Nothing more, Your Honor.

THE COURT: I'd be interested in knowing if the creditors' committee has a position on this.

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank, Tweed on behalf of the creditors' committee.

Yes, Your Honor, the committee has no objection to the motion being granted in its current form. We have reviewed the underlying transactions and have actually been familiar with the ongoing negotiations for probably close to a year at this point, and are comfortable that both the asset swap is in the debtors' best interests in terms of aligning interests more completely to maximize the returns of the assets which we think are the most valuable.

And with respect to the deficiency claim, our FAs have evaluated the forty-three percent discount from the 525 to the 325, I believe, and I believe that in the overall context here, based on both the values at issue with respect to these assets, and all the consideration flowing to the debtors here, that that compromise of the deficiency claim makes sense. So we would recommend that the Court grant the motion as proposed.

THE COURT: Okay. Is there anyone else who wishes to be heard on this?

(No response)

THE COURT: It's approved.

MR. PEREZ: Thank you, Your Honor. Your Honor, the last matter on the morning docket will be handled by Mr. Slack. Oh, no, no, I'm sorry, wait a second, wait a second. I missed one.

There's a third matter, Your Honor, that is a motion to compromise involving Greenbrier Minerals, and Mr. Engman is going to handle that. I apologize, Mr. Engman.

MR. ENGMAN: No worries. I will endeavor to be -- this is an uncontested matter, Your Honor, so I'll endeavor to be brief as well. Richard Engman from Jones Day on behalf of Lehman Commercial Paper, Inc.

Your Honor, I'm here in support of Lehman's motion to approve a settlement agreement with Greenbrier Minerals, as well as Midland Trail Resources. Prior to filing their petition, Lehman Commercial Paper had been a lender to Greenbrier, as well as an equity owner and owner of LLC operating interests in Greenbrier.

As Your Honor may recall previously in June of last year, we were in front of Your Honor on a motion to enforce the stay over a dispute over the corporate governance of Greenbrier.

THE COURT: Whatever happened to that governance dispute?

MR. ENGMAN: Been -- we've been negotiating with them. The company has continued to operate and its officers have taken directions. There have been ongoing meetings of the members of the LLC. I think the settlement agreement before you today, Your Honor, does a number of things, but one of the things that we think it does is it allows the company to keep operating between now and ultimately the point of the settlement agreement, is one of the things that all parties agree on is that a -- Greenbrier should be marketed for sale, and in all likelihood, value could be maximized if Greenbrier, which is a met coal producer is sold and marketed along with a -- with Midland Trail.

Lehman does not have an interest in Midland, and hasn't asserted claims against Midland. So one of the difficulties in putting this all together has been not only agreeing that all of -- that both Midland and Greenbrier should be sold, not only agreeing as to the appropriate breakdown of proceeds from the sale of Greenbrier between Lehman on account of its debt, Lehman on account of its equity, and other members of Greenbrier LLC. But also, given that the parties believe that Midland should be part of the sale, how to share those proceeds of any sale with Midland.

We believe that we've accomplished that through the

settlement agreement and the sharing agreement that's attached. Throughout the negotiations, we've -- the creditors' committee has been kept abreast of the ongoing negotiations. They were given a copy of this motion and the settlement agreement. I'm informed that the committee doesn't have any objection to the settlement going forward. And as I stated before, Your Honor, no other party has objected, and we believe that --

THE COURT: It's unopposed, and I'm certainly prepared to approve it. I do have one question, though, which is whether this settlement agreement means that there will be no further proceedings before me with respect to the governance dispute, which appears to be finessed by virtue of the settlement.

MR. ENGMAN: And sorry to answer it this way, but the accurate answer is in all likelihood. The point of the settlement agreement is to move forward toward a sale. Upon a sale, then a number of things happen. Chief among them being the proof of claim that was filed by Midland against Lehman is withdrawn. It will moot out any of the governance issues, but the effectiveness of the settlement agreement allows the parties to move forward, hire investment bankers, and move forward toward that sale. The ultimate resolution of their issues are left for a sale. If a sale does not happen within, I believe it's a year, and there is a tail period, then in essence, the parties are -- the releases don't become

effective. The claim does not -- is not withdrawn, and the parties kind of revert back to status quo.

THE COURT: Okay. Understood. Is there anyone who wishes to be heard with respect to this settlement?

There's no response. I approve it.

MR. ENGMAN: Thank you, Your Honor.

MR. PEREZ: Now, Your Honor, the final matter on this morning's docket will be handled by Mr. Slack.

MR. SLACK: Good morning, Your Honor, Richard Slack from Weil.

Perhaps it makes sense, Your Honor, when talking about the motion that's at hand, which is really a supplement to the existing ADR or to talk about where we've come from. The existing ADR order has been largely a huge success. The most recent report submitted by Mr. Gruenberger on behalf of the mediators shows that the debtors have served 102 ADR notices on 127 parties, and settlements have been obtained in 56 matters involving sixty-eight counter parties. And of the twenty-nine ADR matters that reached the mediation stage and have been concluded, twenty-seven of twenty-nine have been successfully settled. Really an impressive percentage, Your Honor.

The ADR process has resulted in over 500 million new dollars into the estate. And what our experience has shown is that where the debtors have someone sitting across the table with authority to negotiate with the debtors, that there's a

real possibility of reaching a settlement. Unfortunately, Your Honor, the existing ADR process had not worked particularly well with respect to one set of transactions, that are transactions relating to SPV or special purpose vehicles.

And in those circumstances, Your Honor, the debtors have really not been able to find somebody on the other side of the table who says they have authority to sit down in a room and try to settle.

What the current proposed order does, I should say, Your Honor, is to solve that problem. It tries to put together a process by which there'll be somebody on the other side of the table for the debtors to negotiate with. And perhaps it's also important here to talk about just a typical SPV structure. Because as Your Honor's aware, these differ from structure to structure and transaction to transaction, but typically some type of special purpose vehicle, whether it's a corporation or a trust, has entered into a swap with one of the debtors. And that entity is the debtor's direct counter party. They have privity. They're the ones that have entered into the swap.

That entity typically also issues some kind of notes, and there are noteholders out there that are creditors of this entity. And they use those proceeds to purchase collateral. And that collateral, again typically, goes to both pay the debtors if the debtors are in the money in the swap, and also the noteholders, their principal and interest. And again, the

notes are typically subject to some kind of trust deed or indenture, and that indenture makes it clear that the noteholders do not have authority to negotiate or not to negotiate, but to bring claims with respect to either the indenture or the trust deed.

And I know Your Honor's familiar with that because that was the exact issue that was raised in connection with one of the adversary proceedings, that is the Wong plaintiffs, Your Honor, where noteholders tried to sue on one of these structures. Your Honor ruled that they could not sue directly because they didn't have standing. And that particular part of that ruling, that the noteholders do not have direct standing, was affirmed by the district court.

Now, the proposed order does not reinvent the wheel, doesn't start from scratch. There really is only one major difference to the proposed order, Your Honor, from the existing one. And that is with respect to the structure of the SPV counter parties, the direct counter party to Lehman on these swaps. Those parties have to designate someone within a certain amount of time, typically we've set up a timetable of 60 days, a person with authority to negotiate and settle.

The proposed ADR order treats all the other parties exactly the same as the existing order, trustees, noteholders, investment advisors, all of those parties are treated exactly the same. And I'm going to go over some of the changes we've

made since the original order we filed, and at the request of some of the objectors, and at the request of the committee, we've made a number of changes to conform the existing order in certain respects to the -- I should say the proposed order to the existing order.

Now, the Court undoubtedly has the power to adopt the proposed procedures. At its core, the procedures seek to have the Court do something unremarkable. Remember every one of the counter parties on these swaps, the SPV counter parties, are now subject to litigation. They are defendants in an adversary proceeding. And what this order asks the Court to do is to adopt a procedure that says that a party to an adversary proceeding, a defendant, along with the plaintiffs, go to mediation, and that each party bring to that mediation someone with authority to settle.

The authority to adopt these procedures, as Your Honor recognized in the hearing on the existing ADR order, is consistent with Section 105 of the Bankruptcy Code, as well as standing order M-390, which allows the Court to order parties in adversary proceedings into mediation.

Now, given that each of the counter parties is already a defendant, as I just said, in litigation, those counter parties are going to have to find someone with authority to litigate. They're going to have to designate somebody who can make decisions in litigation, such as whether to file motions

and what to put in those motions, whether to produce certain documents or not produce certain documents. And each of those kinds of decisions are decisions that can bind the SPV; and it seems to us that it can't and shouldn't be that a party has the power to litigate, but not settle. And yet that is precisely the arguments that we've been getting from counter parties and trustees, that somehow there's authority for these SPVs to litigate with the debtor, but not settle with the debtor.

It's also important to understand, Your Honor, what this order does and does not do. There were a number of objections, Your Honor, asserting that somehow the proposed order would require the Court to dig into the trust documents and essentially order people to do things that can't be done under the documents.

The order doesn't do anything of the kind. The order does not require the Court to get into the intramural affairs of each of these counter parties and each of the SPVs. It doesn't set up a particular procedure by which an SPV is going to designate a person with authority. That is left totally up to the particular structure. And that's really no different, Your Honor, than in situations where you have a corporation or a closely held corporation. It may very well be that you have a litigant who's a corporation. There may be warring factions behind the scenes, the Court can still order and still has the power to order that the parties mediate, and that the parties

have somebody with authority to settle.

So, Your Honor, with that, I'd like to walk the Court through, I think, some of the major changes that we've made since we filed the original order, and then talk through -- excuse me.

THE COURT: Before you run through those various changes, and I certainly want you to highlight those on the record, and I note that an amended order was filed late yesterday.

To what extent do the changes that you're about to highlight resolve any of the currently pending objections to this motion, or to what extent do these simply represent an attempt on the part of Lehman to at least move closer to some of the positions being articulated by these objectors?

MR. SLACK: The changes that I'm going to highlight I think get us closer. We've had some discussions over the last couple of months, and then frankly, just over the last few days with the committee, trying to work on some additional changes to the language, and some of those are reflected in the current order. And I think in fairness, we have -- we haven't resolved the objections, but I think the changes that we put in place, when you look at the objections, get us a lot closer to where the objectors, you know, want us to be.

THE COURT: All right. So what you're telling me is that we're going to go through this, and then we're going to

hear from the objectors, presumably, if they're still pressing their objections. And then what's going to happen next? Are you going to request that the objections all be overruled, and that I enter the order with the language that you've proposed, or are you going to suggest that you have a little bit more time to try to accommodate the positions of the objectors in what may be an even further revised order?

MR. SLACK: Your Honor, with the exception of some additional language that we worked out in concept with the committee just before the hearing, we're going to ask that the objections be overruled, and that the order again with the language that I'm going to explain in concept, you know, that it be adopted.

THE COURT: Okay.

MR. SLACK: So, Your Honor, as you know, we had filed an original motion some months ago, and then with our reply, we filed an amended order. And while we did make a number of changes, some of them were just clarifying. There were a couple of changes that I think were important that I wanted to highlight for the Court and the record.

One, Your Honor, is that we added a 9019 process, such that if during the ADR process there is a settlement, then one of the parties in most circumstances can request that it go through a 9019 motion with notice to all constituents, including noteholders, such that no settlement therefore,

through this ADR process will get implemented without at least the parties having the option of going to Your Honor to make sure that people have the opportunity to object.

The second is that we got an objection relating to distributed deals. Meaning that some of these deals where money, some or all of the money has been distributed from the SPV out to the noteholders. And we added a provision that in those cases, where we have elected to bring in the SPV itself, and assuming in that situation, that the SPV doesn't comply with the order and that we seek sanctions, that the Court can, in that circumstance, consider -- and we wanted this to be express -- in deciding whether there are sanctions and whether they are appropriate, whether the deals are distributed deals; and that was a change that I think was directly as a result of some of the objections that we received, and we made that change.

With respect to the order that we filed last night, Your Honor, there are essentially two changes that I want to point out. One is that we -- at the request of the committee, we added back some language to the proposed order that had been in the existing order, and we did it word for word, relating to a concept of authority for trustees.

The committee had asked us to try to make the two orders with respect to the trustees parallel, and so the one piece of the original proposed order that we filed that wasn't

parallel was this concept of a trustee with authority and without authority.

So we added back language that says that where you have a trustee with authority, then that trustee, if we choose to bring them into an ADR, and again, this is the same as we have in the existing order, that trustee can, of course, sit at the table and negotiate, because they have authority under the documents.

If they don't have authority, at that point, certain notices go out to the noteholders, inviting them to come into the ADR process. And again, that's the same. So we've added that language back into the order.

The second is a clarification, something that I think the order already provided, and that was the -- you know, this is really directed, Your Honor, and again, the change that we made from the existing order to the SPV counter party itself. And we clarified in a couple of sections, really in Section 2, 8(b) and 12, and this concept was already express in 8(a), that in all circumstances where we start an SPV ADR, we will serve the direct counter party of the debtors. So the SPV itself will be served.

And then the debtor will have the discretion to serve the trustee or other noteholders or other constituents, if they think that that would help the settlement process. And so that's really a clarification, and those are the two changes

that we made last night to the order.

So one last piece, Your Honor, to talk about in terms of the changes, which is that we had some discussions with the committee this morning, and we've, I think, came to a conceptual agreement on certain additional changes that we're willing to make and it's to the same provision that I just talked about on the authority, trustees with authority. And that is that we are going to agree -- we'll have to work out some language after the hearing, Your Honor -- that the trustee, in consultation with the debtor, will determine whether it has authority.

And then if the debtors -- even if the debtors have authority, they will at that point, the trustees will give notice to the noteholders, at least of the process. If the trustee does not have authority, then that notice would invite the noteholders into the mediation.

So in concept, we've agreed to that with the committee, and we will be working out language with the committee to implement that.

THE COURT: I'm not understanding how that works in light of the legal position that you articulated earlier in your presentation, which is that noteholders ordinarily do not have standing, and that the party that we're dealing with here is the counter party, the special purpose vehicle, which presumably has whatever governance --

MR. SLACK: Yep.

THE COURT: -- restrictions are built into its organization's documents. How does inviting noteholders, who may or may not be representative of the requisite majority of noteholders, to direct action, facilitate the ADR process? I don't understand this.

MR. SLACK: Yeah. Your Honor, I think that's an excellent point. Let me try to clarify how I think this is going to work. Which is that in most circumstances, we would expect to issue the notice directly to the SPV counter party, and be negotiating with the SPV counter party.

And in that process, the noteholders will have whatever rights they have under the trust documents to essentially help designate the appropriate person with authority along with the trustee, et cetera.

So the noteholders will be working as is appropriate under their governing documents to do whatever the particular structure says, to get someone with authority to negotiate with.

There may be situations, Your Honor, where it makes sense to negotiate with the noteholders, and I'll give you one example. Where, for example, you have a distributed deal, meaning that the noteholders actually have the money. The SPV has transferred out. In a deal like that, it may very well make sense to have the noteholders in the room, and again it's

at their discretion, since they've actually got the money that has to be disgorged.

So in a situation like that, it may very well be that the debtor and the committee have decided that just having the trustee, or just having the SPV itself, is not the best way to facilitate a settlement. So I would say that's one example of that in a very particular circumstance.

Your Honor, the objections that we received are, quite frankly, mostly the same objections that we received in connection with the original SPV ADR order, that the Court doesn't have the power to approve this kind of an order, that any ADR should require the participation of the noteholders is a mandatory sense, and that participating in the ADR will be costly and expensive for the trustees and the SPVs. And these are exactly the same issues, each one of them, that was raised in the original ADR order and was overruled.

The objections that still exist, and I'm going to walk through the ones that do, we think should be overruled, and we would ask that that happen today.

The first objection and this is not in any particular order, Your Honor, but -- is one that does go to the power. Some of the objectors argued that Section 105 of the Bankruptcy Code does not authorize the Court to actually modify substantive rights contained in the indentures, and I talked about this a little earlier.

It's our view that this is a red herring, because the proposed order does not invade the governing documents in any way. It doesn't tell the structures how to designate someone with authority. And none of the authority that's cited by the objectors actually limits the Court's authority to order mediation because of one party's private agreements with its own investors.

So effectively, there's no authority that one party's own documents meaning here, if the noteholders have a note with a structure, that one party's own documents can't limit the power of the Court to order mediation.

The second objection, Your Honor, is from some of the objectors that we're -- the argument is that because there are separate tranches of notes, that there cannot be one person with complete authority to negotiate on behalf of the counter party.

And again, Your Honor, our counter party here is a singular entity. This is no different than again a corporation that might have different tranches of stock, some preferred, some debt, has different constituencies. This order doesn't get into the intramural affairs of how the SPV is going to designate someone. But it's appropriate, we believe, for our counter party to have one person who is speaking on its behalf, so that we have someone to settle with.

THE COURT: But what if that's not practically

possible? I mean, one of the things that I've been thinking about as I've looked at this dispute, and I've read, I guess everything that's been filed, although I didn't read it all in anticipation of today. I think I read much of this when this was earlier listed for hearing.

But I've read pretty much everything that everybody has said, and there are a number of questions that occurred to me as I was reading through the various objections. There's no question I have the power to direct that a party in litigation designates someone with settlement authority to appear at a settlement conference or at a mediation. That's pretty basic. But if you have some complex structure with dispersed noteholders that are difficult to identify, and with discord, hypothetically, within that class, and they can't agree either on what to do or who should do it, how do I compel it?

MR. SLACK: Well, I guess I would say it this way, Your Honor. Is it better not to try? Because there's no down side. If, in fact, this order goes into place, and you have a structure and it's complicated, what it says is, you have to go and designate somebody. But if they don't, the down side, Your Honor, is that maybe the debtor brings a motion for sanctions that comes before Your Honor.

And Your Honor I think is already attuned, just by your questions, as to the practical impact. Nothing bad happens in this process unless Your Honor says so. What we

think the appropriate way of doing this is, because we think that under the documents that we've seen, there are processes where these people can be designated. And we think it's important that counter parties attempt, make the attempt to do this, and in fact, we think that if they do make that attempt, it'll be successful. But there's no down side under the proposed order unless Your Honor finds that at the end of the day what happened here wasn't undertaken in good faith, and actually grants the sanctions. Because otherwise, there's no practical impact.

THE COURT: Okay. I have another related question, which goes to something you said earlier. Which is that if an SPV is sued in litigation, and the SPV retains counsel to defend that litigation, there has to be a client to direct the lawyer to do something in that case. Presumably the lawyers isn't going to act at his or her peril, in not having a real client to confer with.

Two questions. Question one is, to what extent do you know the processes have already been undertaken by the defendants that you have sued, to identify some person with authority to act as the client representative? That's question one.

And question two is, is it really true that the authority to litigate is fully congruent with the authority to settle? Because I can envision an SPV counter party

identifying somebody to say fight the good fight, and when you've won, report back to me, or something of that sort, versus somebody who has the kind of discretion to say, you know what, under all the facts and circumstances, we'll pay you X. But then be exposed potentially to having violated transactional documents. And I have no idea what these documents provide, but if they're comparable to the kinds of SPVs that own real estate and tranched debt, there may be not a lot of discretion that a trustee has.

MR. SLACK: So let me answer the first one first, which is because those actions are stayed, and I'm happy to confer with some of my colleagues who may have some better information, but I'm not aware of what the trustees or the SPVs have done in order to obtain authority to litigate in the particular -- in each sort of structure that we've sued.

With respect to the second question, whether the power to litigate is congruent, I agree it is not congruent. The question I think for the Court is whether it's appropriate for the Court to take the position that if there is somebody out there who is able to bind the SPV in litigation, because we all know that there are decisions that are made in litigation which frankly can have huge impacts on a party's rights, and waive rights, bind them, whether or not that same party who wants to litigate should at least be required to try to find somebody to negotiate.

We think that given the track record of the ADR process, it is worth trying to get somebody with authority to sit across from us to talk. And if that can't happen, Your Honor, you know, I think we're going to have a lot of litigation on a lot of structures that's going to be costly to the debtor, costly to the structures, costly to the noteholders, ultimately, because the money's going to come out of the funds, I would assume in some cases to litigate and in some cases, probably not. It is going to be, frankly, a huge endeavor for the debtor, the counter parties and the Court.

And our position is, let's try, consistent with the ADR process that we know has worked, when we've had people across the table who have the power to settle. And again, the down side here is tiny, because nothing happens that's bad unless Your Honor says so. That's the bottom line. You're the gatekeeper at the end of the day to make sure that nothing bad happens in this process.

So, Your Honor, just going through the rest of the objections, there is an objection that we received from some of the trustees that the trustees are being required to undertake obligations which they're not compensated for. And again, this is really no different than the current order. We had those same objections with respect to the current order, and while I know that everyone is sensitive of that, I think frankly that for the same reasons that it was overruled and the first order

was overruled, with respect to this order. Especially given that there really are not any additional obligations for trustees, for example, under both orders.

As I mentioned earlier, there are some parties that believe, Your Honor, that the noteholders should be involved in all of these ADR processes, and we disagree. And again, that objection was also raised with respect to the original ADR order that was adopted by the Court.

For example, Bank of New York raised exactly this argument in connection with the original ADR order, and that was overruled.

The next objection is that we were told that sanctions should be limited to the offending party only. That was the intent of the order and in the current order we have clarified that. I think resolves it, so that only the SPV counter party can be sanctioned for failing to designate a person with authority.

The next objection was that sanctions should be limited to occasions when debtors have proof of bad faith or intentional misconduct by the party against whom it's sought. Again, this -- the order that we have proposed is the same in this regard as the existing one.

The proposed order contains a provision that requires the Court to find that a party did not act in good faith, again similar to what the existing order has. And the point that

I've made to Your Honor before is that, you know, many of the objections act as if the debtors are the ones that actually issue the sanctions here, when it's Your Honor. No sanctions are going to be imposed, you know, without the Court's involvement.

The next objection, Your Honor, is that the proposed order should require that settlements be approved by 9019. I've talked about that. We've added a 9019 provision to address that objection.

There was an objection by one party that the definition of SPV should not include investment advisors to the structures. And again, Your Honor, what we did was we modified the proposed order to make clear that the SPV derivatives counter party is only the contracting counter party, so that the party that has the obligation to designate is our direct contractual counter party.

With respect to investment advisors and the like, again what we expect that in most circumstances we are going to bring this against -- bring in ADR against the SPV itself. There may be circumstances where bringing in an investment advisor or some other party will actually facilitate settlement. We talked about that. We didn't want to limit the debtor's hands and who to bring in in certain circumstances.

You know one point to make on this, Your Honor, is that it's not -- you know, in almost all circumstances, these

ADRs don't come out of the blue. There are discussions with these parties beforehand, and you know, the debtor has and will continue to talk to trustees, investment advisors, and the like, and sometimes there's actually a meeting of the minds, so to speak, as to what the best way of going into a mediation is.

And so I would expect that those conversations, in fact, I can represent those conversations are going to continue, and we think that they are actually helpful. So having the flexibility of the debtor to bring in certain parties, we think facilitates settlement.

Another objection which I've touched upon, Your Honor, is that where funds have been distributed to noteholders, the proposed order should provide that the SPV trustee and the SPV derivatives counter party shall not serve as sort of the authorized designee. The idea there being in distributed deals that the noteholders should be the ones to be in the mediation.

And as I've said, Your Honor, we think that it's important in all circumstances for our direct counter party to be involved in the ADR process, but in consideration of this objection, we added the language that I talked about before, which specifically says that Your Honor can take into consideration whether it's a distributed deal in determining whether or not to have sanctions.

Your Honor, the last objection that I want to deal with separately is one that was filed by the plaintiffs in the

Wong adversary proceeding. And I want to deal with the substance of it first, because it's frankly a tad bizarre.

The Wong plaintiffs object that somehow the debtors are violating an agreement, that they had a stip with them, that was entered into in connection with the derivatives procedures order.

Now, as Your Honor knows, the derivatives procedures order actually has a number of parts, but has two parts dealing with settlement of matters, but also assumption and assignment, and those are separate procedures in the DPO.

The agreement that we reached, I should say, or the accommodation we reached with the Wong plaintiffs only related to the assumption and assignment part, not the settlement part of the DPO. So there was never any agreement with them that settlements with respect to the transactions that the Wong plaintiffs say they should have some interest in, that those transactions will somehow be excluded from any kind of settlement mechanism.

And obviously, Your Honor, you know, this order here would be no different than the existing order with respect to this objection, but it's just factually not true.

The second point I would make, and I don't want to belabor it, is that this objection was filed a month late. There was an objection deadline. As Your Honor knows what has happened and what is typical, is that motions get filed like

this. There are a number of objections, although in this case, there were actually relatively few, when you consider the number of transactions out there, SPV transactions, there were literally 13 or 14 objections. But there is a deadline. And then sometimes the original hearing date gets moved, so that knowing what the objections are, the debtor and the committee and the objectors can get together and try to resolve those. And we did resolve a few of the objections.

That doesn't mean when the date is moved that you can get new objections a month later. And that's just, we think, an important concept for, you know, procedures in front of the Court, because otherwise you having a moving target every time you have a motion or a hearing, if it's moved to try to resolve, you know, existing objections, then you're always stuck with not knowing what's going to come in three days before. And I think everybody knows, you know, we haven't had this issue with anybody else, so I think everybody understands what the standing order means, what it says, and has complied with it. So we don't think that that objection should be considered by the Court in any event.

With that, Your Honor, we would ask that the objections be overruled, and that subject to the language that I discussed that we've agreed to with the committee in concept, but we have to actually get the specific language, that the order be adopted.

THE COURT: Okay. I'll hear from each of the objectors that continues to press an objection in a moment, but I do want to hear from the creditors' committee as an initial matter, just to understand what the role of the committee has been in this process, and what understandings have been reached to be -- that are to be reflected in the amended order.

MR. FLECK: Thank you, Your Honor. Good morning. Evan Fleck of Milbank, Tweed on behalf of the official committee.

With respect to this matter, Your Honor, it's the committee's view that there are certain principles that aren't really subject to reasonable controversy, and we've talked about them already, some of them this morning.

The first is that clearly the Court has authority to implement these procedures, the Court has done that before, and we do agree that in this case, as well, the Court can and should put in place procedures. That brings me to the second principle, which is that procedures to resolve these disputes are a good thing, particularly in this context where there -- we believe there to be significant amounts owed to the estates, and so for the benefit of maximizing recoveries to unsecured creditors, that's also a positive thing.

Another issue that or another principle that's not really subject to dispute is that, these documents that are the subject of the underlying dispute are extraordinarily

complicated. We have expended significant amounts of estate resources, both the debtor's and the committee, understanding them and preparing them for litigation. But as the Court referenced earlier in the colloquy, they are complicated and some of the -- applying the language of the documents and the rules to these principles is not straightforward, and that's an understatement.

The last principle from the committee's perspective is that if we don't come up with a process to resolve these disputes, at least in an ADR process in the first instance, that's a shared problem. We agree with the debtors, that's a problem for the Court, it's a problem for creditors, for the debtors, and for the counter parties.

So the committee didn't file an objection on the record. We have been working with the debtors to try to resolve our issues with the procedures. We have been supportive all along of procedures, and again, we do believe procedures are appropriate here.

The difficulty has been, back to my third principle, the documents, and we've been trying to work towards resolutions that apply to these complicated documents, and apply a process to them that actually will work. I mean, that's ultimately we want something that will work, and that we'll have buy-in from all the parties. Because obviously the Court can order the parties to come to the table, but it's been

our experience that the most successful mediations are those where there actually is buy-in from the parties.

And so we've been trying to put in place some changes to the procedures. Mr. Slack referenced them. We haven't fully worked out the language because -- included discussions as recently as this morning, one of them goes to the -- whether trustees have authority.

The committee is concerned, again, to the point of having an effective process, that if you invite a trustee to the process, and the trustee does not have authority, in its own determination, its reasonable determination, then we're not going to go anywhere. We're not going to have a successful process, and we'll find ourselves back in front of the Court in a litigation.

And so one of the points was that we should defer to a greater extent to the trustee to determine whether it has authority under these documents, and also that there are situations -- and Mr. Slack referenced this -- where it would be appropriate to have the noteholders, the economic stakeholders come -- invited to the process and to participate, particularly where it's not disputed that the trustee doesn't have authority to do that.

Another principle which was important from our perspective is that the SPV counter party be in the first instance the party that certainly will be included in the ADR

procedures. I think the order can be -- could be clearer about that point.

That doesn't solve all the issues with this order. Mr. Slack was accurate that the committee is not pressing an objection with respect to these procedures. They're not perfect and we're concerned about some of the things we've heard from the trustees, and frankly, would've liked for this to be resolved on a consensual basis, so that we would feel more comfortable that the process would be effective. But we also agree that given the uniqueness of these documents, we are relying a little bit more on the Court's continued involvement to make sure that the process is effective. Whereas in the other procedures that we have, I don't think it's the committee's expectation that we'd find ourselves before the Court on a regular basis, to determine whether sanctions, for example, were appropriate.

Now, in the context of sanctions, we may find ourselves before the Court again, to maybe refine the procedures, if we find that given the complexity of these structures, it wasn't working, for whatever reason, through no fault of the parties.

I think there -- the committee has perceived there to be a genuine interest certainly on behalf of the estate's fiduciaries, but on behalf of all parties to have an effective process. We think this does represent the best efforts of --

under the circumstances of the debtors with input from the committee. That's not intended to undermine the objections that we're going to hear from the objecting parties, but we would like to move forward with the process with the recognition that there sort of is a fail-safe, that we may find ourselves before the Court again seeking further direction if it's not working.

And I know that the committee recognizes that, and that's not an ideal situation to be in, but we also recognize that it is a shared problem, and that if we don't come up with a process to move this forward, we're not going to resolve these very important disputes where there's significant value to be had for the estates.

THE COURT: Okay. Is it a fair summary of your position that the committee, with caveats, is supporting the entry of an appropriate order, which may still need a little bit of tinkering, to facilitate ADR with SPV counter parties?

MR. FLECK: Yes, Your Honor.

THE COURT: Okay. Thank you.

MR. FLECK: You're welcome.

THE COURT: Now, Mr. Slack identified areas of objection, but did not identify objectors. I have on the agenda objectors that are listed in alphabetical order from A to J, starting with the objection of Deutsche Bank. I don't know whether or not each of these objectors is present and

represented by counsel today and will be pressing an objection. But what I'll do is I'll simply go down the list, and if you're here and you wish to speak, please do, but in an abbreviated fashion without limiting your argument.

Emphasizing those aspects of your objections that you're continuing to press, and if there are any aspects of your objections that you are withdrawing or recognizing, for example, power of the Court would be a waste of time to argue. Don't spend time on that, because I clearly have the power to do this.

We'll start with Deutsche Bank.

MR. PEDONE: Good morning, Your Honor, Richard Pedone on behalf of Deutsche Bank as indentured trustee for a variety of structured transactions.

Your Honor, ADR procedures are a very good order here, a good idea here, as are procedures for effectuating the settlement. As was explained, these are complicated transactions, and in many ways, the trustee, as evidenced by the continuing improvement of the procedures for trustees, are really stuck in the middle here. What trustees should never face is the possibility of sanctions for responding to the debtors, but saying we don't have authority, or authority is an unsettled question under our documents. Here, Debtors, are our documents, let's talk about it.

Trustees have not been brought into the process the

way the committees have been, in order to work out something that is workable. In many instances, the trustees find that they do have, to quote, many of our documents, the authority to enforce. Whether that applies authority to settle or is an open question is something that actually should be resolved through procedures such as these.

And what we asked in our objection is that the Court order that the debtors sit down with trustees to come up with procedures to both facilitate ADR and get settlements approved, so that the ADR process is not rendered futile, and that has not happened.

I understand the need to move it along, but I'd once again ask that the debtors be ordered to sit down with us, and I'd ask to work something through.

THE COURT: Let me understand something about that position you've just articulated.

MR. PEDONE: Sure.

THE COURT: There's nothing to prevent you from sitting down with the debtor now to develop procedures that are better than the ones that have been laid out. No one is representing to the Court or to any party that these are perfect procedures. These represent the best efforts of the debtor, the committee, and perhaps with some input from objectors to come up with something that is thought to be practical and workable.

Have you sought to do that yourself on behalf of your client?

MR. PEDONE: I have, Your Honor, and frankly right before the last hearing, our request for a longer discussion about how they could be approved was not well received, in light of the overwhelming number of objections the debtors felt that they were receiving, and said they couldn't deal with them on a specific basis.

I'd love to be incorporated in the process with the committee to facilitate an improved order that works.

THE COURT: All right. And assuming you were involved in such a process, what would you be asking for?

MR. PEDONE: Your Honor, the fundamental issue that makes this difficult is the lack of clear authority for the trustee to approve a settlement in most of these. Authority to enforce is typically clear, but not always clear. And so we need to --

THE COURT: I don't mean to break in, but this is really the fundamental problem that Mr. Slack has himself acknowledged.

MR. PEDONE: Yes.

THE COURT: The worst that happens is that there's an ADR, and for reasons of impossibility --

MR. PEDONE: Uh-huh.

THE COURT: -- a trustee is unable to deliver a

settlement that the trustee, in the exercise of reasonable business judgment, might recommend.

MR. PEDONE: Uh-huh.

THE COURT: What can I do about that?

MR. PEDONE: Your Honor, the current procedures actually provide two other bad events for a trustee to occur. One is, we're unable to designate the single individual who can show up --

THE COURT: Okay. What if I just said to you right now, you have to do that. What would you do?

MR. PEDONE: I would ask for an evidentiary hearing.

THE COURT: Because this happened once before with ADR.

MR. PEDONE: yes.

THE COURT: A lot of really smart people have thought about this. I could say, forget all this, I'm just going to give you a one-line order, show up with authority. Is there anything about that sentence you don't understand? Now --

MR. PEDONE: Yeah, I understand.

THE COURT: -- I'm play acting as I say that.

MR. PEDONE: I've been in this spot before. I understand.

THE COURT: I want you to relax. But understand, I have the authority to do that, as does every federal judge in the country. Now, it may turn out to be a less than perfect

mediation, but you're going to show up. And you'll probably do everything that your documents permit and then some to get the authority, for fear of some adverse consequence. This isn't something that requires enormous designing, as much as it requires maybe some ingenuity and diligence on the part of the trustees who have to deal with the assignment they have.

MR. PEDONE: Your Honor, 105 provides this Court with tremendous power to structure procedures that work for everyone. That's procedures that help the trustee with regard to their holders, who have the authority, and can give us the authority. And that is the missing link here. Some more creativity with the debtors using 105 could bring the requisite holders to the table in many instances.

And frankly, your threat of a sanctions order, when my underlying documents, which are not analogous to corporate documents, they're a lot more confused, as far as how you get authority to settle, and how you get authority to make decisions.

A sanctions order threatened against us for failure to do something our documents don't provide, that's actually not constructive. We want to get this resolved with the least cost. As you've heard from other objectors, and I'll repeat, we're not always getting paid for the process here. We've asked to be engaged in a constructive way, but we want to see the process resolved. And it can be better than what is before

the Court, it can be better than parties going into a mediation out of fear, defending themselves over whether they're complying with the Court's order that they have authority, and find authority when it doesn't exist, or frankly, instituting other litigation to avoid bad consequences from an order that doesn't work. It can be better than this, and it should be better than this.

And that's what I would ask the debtors to engage in. Find a way to bring the requisite holders to the table, so the trustees can help the settlement without fear of being sanctioned or being fear of being sued by holders later.

THE COURT: Okay. I understand your position.

MR. PEDONE: So we continue our objection, Your Honor. Thank you.

THE COURT: Ballyrock.

MR. FINK: Good morning, Your Honor, Steve Fink from Orrick, Herrington & Sutcliff for Ballyrock ABS CDO 2007-1 Limited.

And, Your Honor, Ballyrock is one of these special purpose vehicles that this order is directed to. It's the issuer of securities. It's a collateralized debt obligation. And we've made certain limited objections, Your Honor, in respect with the way that this order would apply to Ballyrock in particular.

As the Court's aware, Ballyrock is a defendant in an

adversary proceeding brought by Lehman, it's also a defendant in a counterclaim for interpleader brought by Wells Fargo Bank, NAS Trustee, and in fact, Your Honor, has ordered that those funds be interplay. In addition, Your Honor, certain of the noteholders have intervened in that proceeding.

Ballyrock, Your Honor, is a pass-through entity. It has no assets available to it, all of the assets are pledged to the repayment of the securities that it issued. It's a mere stakeholder, and it will not be the recipient of any of the funds that are at issue in these disputes, regardless of the outcome of the adversary proceeding.

And I think Your Honor's familiar, but Ballyrock's effectively what Lehman calls one of these flip clause cases. There's a dispute between Lehman and the noteholders as to who at the end of the day gets the collateral proceeds.

So, Your Honor, there are two particular respects in which we're objecting to the order. Two different respects in which under the threat of sanctions, the CDO is being or would be compelled to do things that it's not in a position to do.

One of those would be to designate somebody with authority, and of course, I heard the conversation that Your Honor just had with previous counsel, and I don't know that I need to reiterate the arguments. It's a similar situation to that of the trustees, but there is something different about the Ballyrock situation, Your Honor, that I think makes the --

applying the order to Ballyrock particularly inappropriate.

Which is that Lehman has indeed initiated settlement discussions, but not with the SPV, not with Ballyrock, in fact, it's excluded Ballyrock from those discussions. It's had discussions with the noteholders.

I'm not complaining, Your Honor. That's the appropriate -- those are the appropriate parties to those discussions, but in light of that, for Ballyrock nonetheless to be at risk that in the event that Lehman's unable to reach a settlement with the noteholders, that it can then, under threat of sanctions, require Ballyrock to do something that under its documents, it doesn't have the ability to do, and appoint somebody to come and have a second run of discussions, we submit makes no sense at all.

THE COURT: Well, in a sense you've just articulated the reason why, even if I were to enter the order in the form that it has been revised and submitted to me, that there's no realistic adverse consequence to Ballyrock, because as Mr. Slack suggested in his argument, I serve as a gatekeeper for sanctions, to the extent any sanctions might ever be realistically threatened. I'm well aware of the Ballyrock situation, not only because of what you've just said, but because of my involvement in certain pending litigation involving motions to dismiss in the Ballyrock adversary proceeding.

And I'm also well aware, based upon conversations that have taken place off the record, in telephonic chambers conferences, of the discussions that you've just generally described concerning negotiations among the parties.

So the facts determine the outcome. If the facts are presented in the manner that you've just described, the stakeholder you represent can't realistically be sanctioned by a thoughtful judge. And I presume that I'll be such a thoughtful judge at that time if I'm forced to deal with some inappropriate effort to sanction you for not designating a party with authority. And it may be that there'll be carve-outs in application of this order, based upon the facts and circumstances presented. This may not be a one size fits all order, although we're going to need one order.

And so there may be a need for parties to seek what amounts to special exceptions because of the circumstances presented. I'm certainly open to that concept, and I suspect other parties will be as well. This is not intended to be an in terrorem order. But I hear what you're saying.

MR. FINK: Thank you, Your Honor. The second point that I want to raise, it may be of a piece with what we just discussed, but I'd like to talk about it, which are the requirements that the SPV Ballyrock under Sections 5(c)(ii) and (iii) of the order give notice in the event that an ADR process is initiated, and that it would be required to do so, give

notice to noteholders both directly and by publication notice.

And by doing that again under threat of sanctions, and of course, I hear and appreciate what Your Honor's telling me about the prospects of a potential application for sanctions, but this would require Ballyrock to do two things. Again, that it's not in a position to do.

One, to give notice to investors, the identities of which it does not know, and that's not information that's available to Ballyrock. And number two, to do so using means that it has no access to assets to pay for. Ballyrock has no access to any assets at all.

There have been some administrative expenses paid recently pursuant to the Court's order by stipulation that some of the interplead funds be used for that purpose, Your Honor, but Ballyrock itself has no access to any assets directly.

So again, Your Honor, we'd submit that -- that while I hear and appreciate what Your Honor's telling me, we're very concerned nonetheless to have an order out there that holds out the prospect of sanctions, that would require us to do things that are simply impossible for us.

THE COURT: Okay. Understood.

MR. FINK: Thank you, Your Honor.

THE COURT: U.S. Bank.

MR. TOP: Good morning, Your Honor, Frank Top from Chapman and Cutler on behalf of U.S. Bank National Association.

I have with me in the courtroom today, Pam Wieder, who is a corporate -- a Vice-President in U.S. Bank's Corporate Trust Services Group.

U.S. Bank service is trustee for a large number of the CDO transactions that involve credit derivative swaps primarily, where they had the priority of payment issue and things like that. The resolution of that particular matter is going to determine what the noteholders receive obviously, and what the debtors receive, so we have that big priority of payment issue.

Let me also say that we totally understand a lot of the concerns about how to go about resolving a lot of these transactions. In many of these transactions, we don't even know who all the holders are. These are often held through DTC. It may be very, very difficult to obtain the majority that would be needed to approve some kind of a settlement.

But we're not -- we didn't file an objection to say that we're unwilling to try to work out some kind of a process to develop that would make sense under all the circumstances. We just don't think that the particular procedures in this case are particularly realistic or practical.

You know, for example, an SPV receiving a notice of an ADR with little or no assets of their own, it's likely that -- and the trustee has gotten in a number of cases already, an e-mail saying, hey, we just got this subpoena in connection with

the lawsuit, what are we supposed to do with it?

So the process has to be one, that's going to actually be practical and lead to a result.

THE COURT: Let me ask you a question, and it's something I referenced in colloquy with Mr. Slack earlier. Your client is trustee with respect to any number of SPVs that are defendants in pending litigation, some of which has been stayed, correct?

MR. TOP: I believe it's all been stayed.

THE COURT: Okay. It's all been stayed. I didn't know if there was some litigation that was filed before the September date that affected you. But let's just say it's all stayed. What, if anything, have you done to notify noteholders of the pending litigation, to organize noteholders, to take steps to obtain authority to act on behalf of noteholders, or to otherwise perform the duties of a trustee under these circumstances, or have you taken the stay as an opportunity to sit on your orders?

MR. TOP: No. As a matter of fact, even before, when Your Honor came out with your opinion as it related to the -- I believe it was the Dante decision, the perpetual thing, we sent out a notice to all our noteholders, advising them of that particular decision. When they filed the action in September, among other notices that have been prepared and sent out to noteholders or certificate holders, we sent out a notice to all

noteholders saying, this action has been filed and, you know, this particular district court, and this is the relief they're trying to seek. In each case we've asked them to identify themselves, so that we can try to get some guidance as to what to do with these particular matters. And finally --

THE COURT: Okay. Let me break in, because I don't need to go into all the good things that you've done, and I know it's an opportunity to do that, but I was really trying to understand if a process has already been undertaken. And assuming that other trustees similarly situated would be doing the same kinds of things, what's the problem, assuming you have an organized noteholder group, in identifying a party to act as a designated person with settlement authority?

MR. TOP: Well, a -- of course, it depends upon whether we have a big enough noteholder group. But there are -- most of these transactions have a number of different classes of securities in there. And the way the priority of payment thing works is if, you know, there's a Class E that's way at the bottom, and if the debtors prevail on the legal issue with respect to priority of payment, that Class E's going to get zero.

How do you allocate then a settlement, you know, so instead of you work out with the debtors, and you say well, maybe we'll agree on fifty cents on the dollar. Do you apply that fifty cents on the dollar in accordance with the

waterfall, or shouldn't you really have to pay something to the lower tranches, because you're giving up their legal right, really. You're giving up their ability to be able to get some kind of an economic return on this transaction.

And so I understand that the debtors themselves aren't concerned about the intramural intercreditor activities and things like that, but we are, and -- but we have given a lot of thought to this matter. And, you know, in other circumstances, we've been able to come up with a procedure that actually does work.

But there are a lot of common issues in a lot of these transactions. One common issue is this whole how to resolve the priority of payment provision. And it seems to me that you could get a group of noteholders together across different transactions with differing rights to kind of be a global oversight board of a certain number of issues.

One would be priority of payment, one would be how do we deal with different tranches, and allocating the settlement to those certain tranches. There's all sorts of methodology issues relating to these derivative transactions that could be resolved by some kind of a global conference of noteholders.

And the fourth is, just common documentation to do all of that. And we've done this in a number of different situations. In Conseco, for example, we had a situation where we had a servicing fee that was both at the bottom of the

priority of payments, at the bottom of the waterfall and small, and so that the servicer of these manufactured housing loans was getting nothing for doing their job and they were going into bankruptcy, and you know, there'd be billions of dollars of manufactured housing notes without any servicer.

We were able to work in that group, there was at least 140 transactions involved there. We were able to identify a group of noteholders that would give the trustee guidance on the global issues that related to that particular issue that affected all those indentures, and we did this as a part -- a trust -- a 9019 settlement with a trust instruction feature to it, and get the Court to approve it. But that requires --

THE COURT: Well, these procedures now include such a 9019 concept, and there's nothing in these procedures that, as far as I can tell is intended to limit your creativity in dealing with the class of noteholders in each of these structures.

So what you've just said actually gives me more comfort, as opposed to less comfort that approving these procedures is a good idea.

MR. TOP: Well, we would like to go through one of set of processes first and then go to the second set of processes if that's what needs to occur.

The other problem with all of this, of course, is funding. In some transactions we have some underlying assets,

but at least, you know, if you believe what the documents say, we have very limited ability to use those things.

In order to do a 9019 kind of a process, I need to come before you and say, Your Honor, you know, we've taken a look at this transaction from a noteholder's perspective and we think it's fair and reasonable. And if I don't have money to get a good valuation of the credit derivative transaction, don't get good financial advice as to how to split up the money, it's impossible for me to come before you to say, Your Honor, we think this is okay.

And just as they have that on their side. You know, they need to come to you and say from the debtor's perspective, we think this is fair and reasonable.

The other nice thing about a more global approach to this problem is transparency. You know, you're going to have a lot of mediations where if you get holder consent or approval to do these things, where holders are going to say, boy, I don't want to be the guy that settles at sixty cents on the dollar when all these other people settled at twenty or thirty. This more global approach to try to develop some kind of a percentage to pay with respect to this termination payment, is a way to provide that transparency and maybe get more people to stand up and say, yeah, we -- so long as everyone else in it, we'll be okay with that, too.

It just seems that, you know, there's more creative

ways to do to try to skin this cat. And again, it wasn't just Conseco. We've done this in United with aircraft, done it with DVI with another securitization transaction. And so I would urge the Court to continue this motion, to see if we can try to develop some kind of a system along those lines, but it will require funding.

Again, you know, the current order as drafted mandates that someone provide notice, publication notice, in the Wall Street Journal and the Financial Times. Well, I've just placed an ad in the Wall Street Journal, just a five-inch column for one day, and it cost 11,000 dollars to do that. You've got to do it for three consecutive days in two different publications, you know, that could cost you as much as 100,000 dollars if the notice is robust. And if you're in fifty transactions, that's five or six million dollars. I mean, that's a huge expense that the debtors are asking the trustees to bear as part of this.

THE COURT: Okay. I've read that in your objection and I've also read the debtor's response, and we're not going to have any cost shifting as a result of this process. And you're a trustee and you'll just deal with the obligations as you have as trustee without having the estate cover it. Is there anything more?

MR. TOP: Let me just read quickly through my notes. I guess the other thing I would say is, you know, this whole

notion of confidentiality, there's a lot of confidentiality provisions in there. It's very, very difficult for a trustee to notify holders of their -- of what the resolution ultimately is if we're supposed to keep those confidential.

I understand that they have a process whereby we're supposed to be the gatekeeper of financial agreements, but frankly, their economic investment is what it is, and you know, the trustee should have the ability to talk to noteholders about what's been proposed and whether it's acceptable to them, to the extent that they can find these noteholders.

THE COURT: Okay. Thank you.

MR. HOOK: Thank you.

THE COURT: Bank of New York Mellon. And I note that there are joinders of HSBC, apparently two separate joinders of HSBC in the Bank of New York Mellon position, and I'm not going to give HSBC an opportunity to separately comment unless you miss something, Mr. Schaffer.

MR. SCHAFFER: Thank you, Your Honor, Eric Schaffer for the Bank of New York Mellon.

We were served around midnight with eighty-eight pages of the revised order. I have to say, it's real progress. It restores a lot of what was taken out of the earlier order that was heavily negotiated, and I think it's a lot of progress there.

We understand from listening to the debtors and the

committee that there are some more changes that may be made, that may relate to the treatment of trustees with or without authority. We want to have an opportunity to review this. Having leafed through it this morning, I think we have some minor comments, where we're going to make sure there's consistency between 5(a) and 5(b), what happens if we don't have authority. But I think the restoration of language that was in the earlier order is real progress.

We'd like to see what this finally is before we say we're prepared to consent, but we're getting close. One reaction to what Mr. Slack said, I have a lot of things that I could argue on the merits, but I think based on the revised order, I don't need to get into that.

He said that our objections to the first motion were overruled. They were not. You told us to go out and negotiate, we did, we came here before with something that was consensual. We're happy to talk to the debtor and to the committee. We have reached out to the debtor. We didn't get a response, but we're happy to try and see this go forward on a consensual basis.

THE COURT: When you say you're happy to see this go forward on a consensual basis, is that a request consistent with the request made by counsel for U.S. Bank that some additional time be permitted to give the parties who are affected by this an opportunity for greater input? Or is it

simply a request that you have more time to take a look at the order as revised at midnight last night, that you've described as a demonstration of real progress, to put finishing touches to that form of order?

MR. SCHAFFER: We would like to have an opportunity to have more input, but having said that, I think that we're very largely satisfied, because this tracks what we agreed to before. We're not trying to improve on what we found to be satisfactory before.

What I'm saying is, I'd like to see the final product with any changes that are yet to be negotiated. I'd like to be able to talk to the debtors and the committee and say, here's a clarification that I think is necessary, for example, between 5(a) and 5(b). We're not talking about needing a lot of time or a lot of input from our standpoint.

THE COURT: Okay. And when you say consensual, you're talking about consensual as to your client?

MR. SCHAFFER: That's correct.

THE COURT: Okay.

MR. SCHAFFER: I think we're very close. We want to see the final product, have an opportunity to either fix it, come in here and raise an objection or say -- or declare victory if that's the case.

THE COURT: I think in a mediation order, you're never declaring victory.

MR. SCHAFFER: Thank you, Your Honor.

THE COURT: But I understand what you're saying. Are there any parties who joined in the Bank of New York Mellon objection who feel the need to say something in addition to what Mr. Schaffer has said?

There's no response. We'll move on with the limited objection of Wellington Management.

MR. BERMAN: Good morning, Your Honor. Mark Berman from Nixon Peabody here on behalf of Wellington Management.

Wellington Management is an investment advisor to two of the CDOs involved in these disputes. Wellington is not a party to any pending adversary proceeding, and Wellington under the revised order, is now not a derivatives counter party. Yet the debtor reserves the right in the amended order to -- reserves to itself the ability to designate an investment advisor as a party to the ADR process, because as Mr. Slack states, the debtor believes it might be helpful. Now, the order as revised doesn't solve the problem of a non-party to an adversary proceeding being brought into the ADR process, therefore, required to file a response, to engage in the process itself at a distant forum. Wellington's from Boston, it's required to come to New York to appear and be heard in connection with the ADR process, and as an investment advisor there can't be any argument that it has authority to do anything. It's more akin to what a witness would do at a

hearing, as opposed to a party to an ADR process.

Now, I've looked for and found no authority, no legal precedent for a non-party to litigation to be brought into an ADR process. None is cited. I don't believe any exists. Under these circumstances, we do not believe that an investment advisor to a -- excuse me, to a CDO should be capable of being brought in as a party to an ADR process.

THE COURT: Let me just understand. I hear your argument, but let me understand Wellington's role as investment advisor. Wellington is not an independent financial advisor, by particularly by contract it provides services akin to management services for these various SPV structures, and would have the institutional memory, the documents and the know-how to deal with issues that relate to not only the management of the structure when it was up and running, but presumably the distribution of assets from that structure to parties that have an interest in it or --

MR. BERMAN: Your Honor, I don't believe that's a correct description --

THE COURT: Don't -- please describe Wellington's role.

MR. BERMAN: My understanding of it was that it was involved in the calculation of the termination amount. It also would've been responsible, although this is not in dispute, as to how the assets of the CDO were to be invested. It was an

investment advisor. It's not the trustee, it's not the issuer, it's not a noteholder, it does not have an economic stake in the enterprise.

THE COURT: Retained by the trustee?

MR. BERMAN: By contract with the issuer, I believe.

THE COURT: Sounds like you're baked into the structure.

MR. BERMAN: But, you know, in the sense that a -- any company, any party out there in the world can enter into a contract with anybody else, that doesn't mean that it has either authority, a stake, or any purpose to be served in being part of an ADR process where you're trying to settle a dispute.

Again, it may be a witness with regard to, you know, how did you calculate the termination amount, what were the elements that you considered, then I can understand --

THE COURT: Okay. I don't know enough facts about Wellington's role with particular SPVs --

MR. BERMAN: I understand.

THE COURT: -- to make a judgment about this. But I want to hear what the debtors have to say in --

MR. BERMAN: Understood.

THE COURT: -- further response. I understand your position is that you can't be compelled to mediate.

MR. BERMAN: Thank you very much.

THE COURT: Bank of America.

MR. TOP: Your Honor, by reason of succession in some of their trust business, U.S. Bank is now in their shoes, and I've already said my piece.

THE COURT: Fine. Principal Global Investors (Europe).

MR. BURKE: Good morning, Your Honor, Michael Burke, Sidley Austin for Principal Investors and Principal Life Insurance Company.

At this particular time, we're very, very close to reaching an agreement with the debtors, and so I feel comfortable in saying we withdraw our objection.

THE COURT: Fine. Thank you very much. The Minibond Noteholders.

MR. DAVIS: Good afternoon, Your Honor. Jason Davis of Robbins Geller for the Minibond Noteholders. That's Adversary Proceeding 09-1120 in the Court's docket.

As the Court noted, the Minibond Noteholders lodged a limited objection with the Court. The objection basically requests that the case that plaintiffs filed on March 12th, 2009 and have been litigating for nearly two years now be carved out from the procedures that debtors have proposed to the Court.

One of the principal motivating factors, as I understand debtors for the procedures, is one of practicality. They don't have people to sit down with and resolve the

problem. Now that practical issue that they face, perhaps in other circumstances, isn't present in our case because there are representatives of the noteholders, the required trustees have been joined, and the debtors have been joined.

We are now and always have been opened to sitting down and negotiating with debtors in good faith, and for that reason, I don't see why we need procedures to cover this particular case.

Our case has not been stayed. As Mr. Slack indicated, the district court allowed the case to go forward, we filed an amended complaint, and we think it's very clear now that the representative noteholders have standing to step into the shoes of one of the trustees to litigate the critical underlying issues. And that is, who is entitled to payment under the notes?

So that is the one point I wanted to make very clearly up front, is --

THE COURT: Here's what confuses me. I don't mean to break into what you're about to say. Why shouldn't the mediation procedures of this order as it applies to SPV counter parties apply? And why are the Minibond Noteholders any more entitled to a carve-out than noteholders in any other structure?

MR. DAVIS: It's a fair point, Judge, and it was actually my second point. There are circumstances in our case

that are particular with respect to the special purpose vehicles.

THE COURT: If anything, though, they're weaker. Because as we've already discussed in other hearings, the Minibond Holders are a step removed from the noteholders in many of the structures that we're dealing with. We're not talking about direct noteholders, we're talking about noteholders of a noteholder.

MR. DAVIS: Two points. I'll address the second point second.

The first point on why the special purpose vehicles are different in this particular case, is the special purpose vehicle that issued notes to my clients was created and controlled by Lehman Brothers, essentially to borrow money to buy more of its notes issued by an entity we're calling Saphir Finance.

Now, neither of these entities are real entities. And both of these entities, both at the beginning of the creation of this program, and most certainly toward the end of the program, had conflicts with the noteholders that we described in detail in our amended complaint.

And the person who was supposed to be making decisions on behalf of both of these entities, each HSBC Bank, U.S., USA National Association, essentially wasn't doing its job, because it was trying to end its business relationship with Lehman

Brothers throughout the course of the summer of 2008. So there are very clear details and facts that plaintiffs obtained from the Valukas report showing that HSBC was conflicted during the summer of 2008, was engaged in self-dealing, and was not in a position to act on behalf of the noteholders. It's supposed to be doing that today, and it's certainly hasn't done that.

Now, the position we argued in front of Judge Pauley and the position he accepted was, you should be permitted in light of all of the details out in the public record to amend the complaint to demonstrate that you do have derivative standing in this case.

Now, what does derivative standing do in respect to Your Honor's second point is --

THE COURT: I think we're going too far down a path that I don't want to be on. I understand that there's a motion to dismiss, your amended complaint, there'll be a hearing after full briefing on the issues of standing, and your rights to derivative standing, and I don't want to preview those legal issues now, because I'm focused on something very narrow.

You have a late filed objection, which you style as a limited objection that I could, according to Mr. Slack, disregard simply as too late. But we're here to talk about why the Minibond Noteholders are the only noteholders raising objections to this, because this is a motion that is directed to SPV counter parties. Why are you here?

MR. DAVIS: And that was the Court's second question, and that goes to what exactly are SPV counter parties?

Now, some suggestions have been made that they can make decisions, but the reality is, these are shell corporations that are set up in the Cayman Islands to do very, very little, and from the practical perspective, if debtors sat across the table from the special purpose vehicles, a legitimate question is posed as to who are these people.

In the case of the Minibonds, the special purpose vehicles were created by Lehman itself, and controlled by Lehman itself. And so it's our position, Judge, that it's unfair to allow the debtors to essentially negotiate with themselves. That's point one.

Point two, even if they are successful, even if the counter parties that they say have the ability to negotiate say, you know what debtors, you're entitled to a hundred percent. That doesn't resolve the problem. The question becomes, how do you pay that? And the only way you can answer that question is by going back to the trustees and applying the applicable waterfall payments.

So I don't see how bringing special purpose vehicles that are not operating companies, that have no businesspeople running them, and that were set up by Lehman is an effective or practical approach in our case.

THE COURT: Well, I hear what you're saying, but

you're not saying anything that you said in your limited objection. Because the limited objection was focused on this being somehow in derogation of an agreement that was made with you last time around. And you've said not one word about that.

MR. DAVIS: The limited -- two points. So the limited objection does say that we object because essentially, allowing that order to apply in this case, would basically allow Lehman to negotiate with itself, and that's a serious problem in our case.

On the second point, on the stipulation that we had in place with debtors, it's two pages. The language could be a lot broader, but it does carve us out from derivatives procedures for assignments. And now I understand that it's debtor's position that that doesn't cover settlement, but it was our position at the time that it did. There are e-mails backing this up, I'm told, I wasn't personally involved in that process.

THE COURT: Okay. I understand. I understand your argument, and I'm going to give the debtor the opportunity to respond to each of the objectors, to the extent that the debtor wishes to do that.

MR. DAVIS: Thank you, Judge.

THE COURT: Thank you.

MR. SLACK: Your Honor, I'm going to try to be relatively brief, though there are a number of objections where

I'd like to make a couple of comments.

Mr. Pedone on behalf of Deutsche Bank talked a lot about sanctions against trustees and the risk of sanctions against trustees. And frankly, I think his objection misses the point of the order, which is with respect to trustees, this order is the same as the existing order. They're not the focus of any of the changes that we've made with the existing order and the proposed order, and the trustees and the issues that he raises with respect to sanctions are the exact same that you have under the existing order.

The proposed order, the only again really new provisions in the proposed order relate to the designation by the SPV counter party of someone, so I don't frankly see any difference between the obligations that the trustees would have under the current order, and the objections that they had at the -- for that order that were overruled and in the current one.

Now, the other thing, Your Honor, is there was some issue that Mr. Pedone raised about trustees with authority. I would tell Your Honor that is precisely the issue that I raised earlier that we've worked out in concept a -- some new language with the committee, and I think that that new language, in fact, addresses specifically the issues that Mr. Pedone was raising there.

With respect to Ballyrock's objection, Your Honor, one

note of clarification, because I think it's important, is at one point Mr. Fink said that noteholders had intervened in the Ballyrock action. That is not technically correct. That was an interpleader action, Your Honor, and they appeared just as the debtor has appeared, and it may be a point of procedure, but it's not an intervention as that's understood.

THE COURT: Yes. But in that litigation, the practical reality is that I think Barclays is one of the largest noteholders that's separately represented --

MR. SLACK: That's exactly right, Your Honor.

THE COURT: -- took positions in the pending litigation.

MR. SLACK: And I say that's a technical point, but I think they're -- I agree with you that they are -- they have appeared in that action and they are --

THE COURT: They're here.

MR. SLACK: -- represented, and as we know, they are aggressively litigating.

There's a number of points that Mr. Fink made about sanctions, and I would just say that, you know, the debtors have a track record with respect to the existing ADR order. It's something I talked about in my opening remarks, but the debtor has, I think already been very judicious, in coming to the Court, and has, in fact, tried to work out all these issues under the existing order, even though the existing order has a

sanctions provision as well.

I don't think the debtor would either bring a silly or unfounded sanctions motion, and I don't think that that would be well received by the Court. So I think again, the Court being the gatekeeper of that has very limited down side with respect to that issue.

Both Mr. Fink and then Mr. Top on behalf of U.S. Bank talked about the notice issue, and I think Your Honor had asked a question which I want to pick up on, which is that the SPVs or the trustees, however the internal documents work, with respect to the litigations that are outstanding, are already giving notice to noteholders pursuant to however they're doing it in the litigation. That again is one of those intramural ideas. It really is no different for them to give this kind of notice that's required under the ADR SPV order, you know, than to give the notices about the litigation. Because remember, they are defendants in the litigation, and to the extent that they're giving those notices, this is really more of the same.

Now, Mr. Top, I think went through, on behalf of U.S. Bank an alternative kind of a structure. I can tell you that discussions with trustees, discussions with SPVs are not going to stop because this Court issues an order. If a trustee has a creative idea as to how we can better sit down in a room and settle these, we're open to talking about it.

I can tell the Court that that's something we're

interested in and willing to do. It has to make sense. But the discussions aren't going to stop just because Your Honor, you know, signs an order. Because what we're looking for is the most effective way to sit down and find somebody on the other side of the table that we can talk with and try to settle these cases.

The only other point I'd make about the expenses, Your Honor, is that again, these SPVs and trustees are defendants in litigation. So the costs of things like valuation experts and the like are going to have to be borne by them in litigation, and it makes no sense to say well, if we're going to talk to try to resolve these and actually save money for everybody, that that cost should be, you know, somehow shifted to the debtors. I think Your Honor was on the right track there. We agree that there shouldn't be fee shifting.

With respect to Mr. Schaffer and BNY. We appreciate his comments that the new order that we submitted last night has real progress, and is close. We think that, in fact, with the trustees, with the committee, that the language that we proposed last night, and then are going to address with the committee, we think is going to resolve a number of the comments that we had from the trustees, so we're gratified to hear that.

With respect to Wellington Management, that's the investment advisor, I have a couple of points with respect to

that.

Number one, I think Your Honor hit something on the nose with respect to that, and obviously an investment advisor is going to -- their role is going to be contractual. So it may very well be in particular situations, it makes no sense to bring in an investment advisor, and we're not going to bring in an investment advisor just to have somebody sitting there.

On the other hand, it may very well be that in certain circumstances it's the investment advisor that has the contractual management role, both with respect to things like valuations and decisions, and it may very well be important for the process to have that person there.

The debtor -- all the debtor is asking for is the discretion to do that at the appropriate time. I would say that the Court does have the power to bring in parties such as the investment advisor, because again remember, in certain circumstances, the investment advisor is the one because they're managing the assets that you're actually talking to, you know, when you are the debtor.

And if you look at, you know, the standing order M390, it's very interesting when it talks about types of matters subject to mediation, because it says, "Unless otherwise ordered by the presiding judge, any adversary proceeding, contested matter, or other dispute may be referred to the Court to mediation."

So you don't have to be a party to an adversary proceeding or a contested matter. You can have a dispute. And again, if you are the debtor, and you're talking with the investment advisor as essentially the party that's managing the assets, then they're going to be an important person perhaps in certain times to show up.

So that brings me to the Wong plaintiffs, and I guess I want to resist arguing the motion to dismiss that we filed and that they're going to respond to, although much of Mr. Davis' comments --

THE COURT: If you don't resist it, I will resist it.

MR. SLACK: Thank you. The -- with respect to the substance of the limited objection, I think if Your Honor looks at the language of the side letter, it's very clear that it only applies to the assumption and assignment provisions. I don't think there's any ambiguity in the language.

I would be prepared, Your Honor, if Your Honor feels it's needed, to hand up the e-mail traffic. We have it with us in court. Because what happened was we -- in this order we said, you know, this is going to apply to the assumption and assignment parts. The Wong plaintiffs wrote back an e-mail saying they wanted it to apply to the settlement parts, and Ms. Collins (ph), who's here, wrote back an e-mail that said, we're not going to do that. It only applies to settlement and that's what it says.

So I'm happy to hand that up to the Court if that's --

THE COURT: I don't need to see it.

MR. SLACK: -- necessary.

THE COURT: I don't need to see that.

MR. SLACK: With respect to whether the Minibond holders should get sort of a special exemption, the answer is I didn't hear anything that would suggest why one set of Noteholders should get any sort of pass to the procedures. There are probably some other good reasons why these particular plaintiffs shouldn't get a pass here, but I don't think again we need to actually address that, because there really is nothing that I've heard that says why this group of deal should get excluded.

We think it would make sense, frankly, for deals like this potentially to be in it. I think that's a discretionary thing that the debtor looks at, and frankly, with consultation with the committee as to whether a particular deal should go into ADR, and we would want to keep that discretion with respect to these deals. So with that, Your Honor, we would again ask that the Court approve these procedures, subject to the language that we're going to work out with the committee that we've agreed to conceptually and overrule, the remaining objections.

THE COURT: All right. Thank you. I am going to approve these procedures and overrule all the remaining

objections, and do so for the following reasons: I think everyone would acknowledge, including the debtors, that the procedures that are laid out in the proposed form of order, even including all of the revisions, are not perfect, but they represent best efforts at achieving a very desirable goal, which is to make mediation a viable alternative in litigation against special purpose vehicle counter parties.

The Court recognizes, based upon the objections that have been pressed, as well as those that have been resolved prior to the hearing, that the structures involved here are, as everyone understands, complex, in some respects unique, involve difficult issues of governance; and just because it's difficult doesn't mean we shouldn't have a mediation process that is workable.

In the end, what makes the mediation process workable is less the language of the order and more the willingness of the parties who are engaged in the process to work responsibly and in good faith with each other and creatively with their various constituencies in order to achieve desirable outcomes. In part for that reason, it's obvious to me that we are never going to come up with a form of order that is perfect or ideal or completely comprehensive in respect of each and every one of the counter parties, nor will we come up with a document that anticipates every issue that may arise.

I appreciate Mr. Slack's suggestion that no real harm

can come from this because the Court will act as a gatekeeper. I'm not sure if that's cold comfort or any comfort. It is, however, true that, to the extent that there are sanctions that may flow from a refusal to participate in ADR, it will be fact-specific. It will be based upon a record. There will be defenses, no doubt, to the extent it ever comes before the Court.

There may be issues of impossibility, despite best efforts to obtain authority to settle. In the end, I can't anticipate any more than you can what the facts will be that might give rise to a motion for sanctions or that might lead me to think that sanctions are appropriate. But in a world in which parties are actually acting responsibly, this is purely theoretical.

I heard the arguments of Deutsche Bank and U.S. Bank, being the principal remaining objections of trustees. I believe that, notwithstanding those objections, U.S. Bank actually suggested that there are ways to skin this cat, and that he in his experience in other cases has managed to deal with complex constituencies of noteholders. That's great. You can do it again here. I was also particularly impressed with the argument made by Mr. Schaffer, because he must have used the two words real progress about three or four different times, and I like that. That to me suggests that, to the extent Bank of New York is a paradigm of what other trustees

will be dealing with, than Deutsche Bank and U.S. Bank and Bank of America having become, in effect, part of the U.S. Bank family for these purposes should be able to work with the very same order. In other words, if it's good enough for one trustee, it probably should be just fine for other similarly situated trustees. And to the extent it's not, recognizing this is not a one size fits all situation, and that application of the order in certain instances may actually be a source of prejudice to any party, the entry of the order does not limit the ability of any aggrieved party to come to court and complain, but it had better be for good cause.

As for the Minibond Noteholders, their objection is overruled as untimely, and based upon the representations of counsel, that these procedures are not in conflict with earlier agreements. To the extent that the argument with respect to the limit objection touched in any way on matters to be heard by the Court in connection with the renewed motion to dismiss the admitted complaint, I'm disregarding all such argument without prejudice to the same arguments being made when we have a hearing on that subject. In terms of the form of order itself, I gather from the comments of the creditors' committee that there is still some things to be done to the order. I would hope that in the process of developing a final form of proposed order that Mr. Schaffer's remark about a consensual order be respected and that, to the greatest extent possible,

workable language be developed in a civil manner as a result of ongoing cooperation among the parties.

To the extent that there are parties whose objections have been overruled who have substantive disagreements as opposed to language issues, I'm not inviting them into the room to agree to an order. You either are a part of the process or you're not. Hopefully the order will reflect the creative thoughts of all interested parties, but we're not restarting the process all over again. So if you have a bunch of creative ideas that involve a total reshuffling of this deck, you can forget about that. The debtor's motion to implement alternative dispute resolution procedures for affirmative claims, under derivatives transactions with special purpose vehicle counterparties -- and that's quite a mouthful -- is approved. And we're adjourned until two o'clock.

(Recessed at 12:15 p.m.; reconvened at 2:06 p.m.)

MR. MILLER: Afternoon, Your Honor. This is Ralph Miller for the Weil firm on behalf of the debtors. The first two items on the agenda this afternoon are both the Lehman Brothers Holdings, Inc. versus United States of America, adversary case number 10-03211. They're items five and six, and Mr. Raj Maden at the Bingham firm will handle those on behalf of Lehman Brothers.

THE COURT: Okay.

MR. MADEN: Good afternoon, Your Honor. Raj Maden for

Bingham McCutchen for LBHI. Your Honor, both LBHI and the United States have filed motions for letters of request pursuant to the Hague Convention seeking this Court's assistance in obtaining foreign discovery from LBIE. Before I actually get into the details of the request and other substantive matters, I thought it might be worth just spending a minute on the procedural history here.

The motion for -- to withdraw the reference was granted by the Federal District Court and then referred back to this Court for discovery purposes. And Judge Berman, who's assigned in the Southern District of New York, set a discovery cutoff for March 30, 2011. And the one -- this may come up as we have discussions. When we met with Judge Berman in the scheduling conference, he asked us, meaning the United States and LBHI, to seek any extensions of discovery directly from him. So I just want to sort of point that out. The case, you may recall, is about certain stock lending activities between LBI, the U.S. broker dealer, and LBIE. Specifically, LBI lent UK equities to LBIE. And as is customary with such stock-lending activity, when the UK issuer paid a dividend, LBIE was -- as the borrower, was obligated to make a substitute dividend payment to LBI. That substitute dividend payment attracted UK tax, pursuant to UK law and the tax treaty between the United States and the United Kingdom.

LBHI claimed a foreign tax credit with respect to

those UK taxes that it incurred. And the primary issue in dispute is the Internal Revenue Service disallowed those foreign tax credits. But what's relevant here is the fact that what we're talking about are stock-lending transactions, specifically LBIE's stock borrow of UK equities from LBI, and that sort of informs LBHI's request. We, on behalf of LBHI, have made four very narrow requests for information that directly go to the context of the issues that are in dispute, specifically -- and rather than make it four requests, we can break down those four requests into two categories. The first category involves stock-borrowing activity from LBI, and what we've asked for is all the stock borrows that LBI engaged in from 1997 to 2005. That trading activity is housed in a trading system referred to as Global One, and LBIE has access to that trading system, whereas LBHI and LBI do not have access to that trading system.

So we very narrowly requested borrowing activity from LBI for that period of time. And the second sort of category of information that we've requested is something called UK Tax Reclaims, and what that is is that LBI -- well, let me just take one step back. Prior to the transactions that are at issue, the UK/U.S. treaty was slightly different than it is now, or at least the application of that treaty is slightly different than it is now, where the recipient of the substitute dividend payment was entitled to receive a refund of a portion

of the taxes that it incurred on these -- when a dividend was issued. And so the reason this is relevant is that LBI sought these refunds and invoked the same treaty provisions that we're dealing with, with respect to the transactions at issue. LBIE -- representatives from LBI assisted LBI in obtaining these refunds, and we know that they have some of the information relating to these reclaims. And so we've, again, very narrowly requested those reclaims and letters between the HMRC, which is the UK equivalent of the IRS, and LBIE.

We, as is laid out in the papers filed by both LBI and LBHI, we've tried to work over the past fifteen months with LBIE in obtaining this information informally, pursuant to the TSA and then more recently the services agreement. And I think it's fair to characterize those discussions as very cooperative, and I think we've made some progress in identifying the methodologies for obtaining this information. But we concur with LBIE that there have been logistical challenges in obtaining this information.

And I'll say further that perhaps we would have continued to pursue those informal discussions if it were not for the discovery cutoff of March 30 and, frankly, the transmission from engaging in an administrative process with the IRS to now being in formal litigation. And so, because of those two reasons, we would like to pursue these motions for letters of request and obtain this information formally, and

also within the time frame we've identified. We think we've satisfied both the U.S. discovery rules and the UK discovery rules without getting into very much detail at a high level because our requests are so focused, and there is really no objection or commentary that the requests we've made are not relevant to the issues that have been presented. I'm happy, Your Honor, to address some of the considerations that have raised by LBIE if you think that's appropriate now, or if you'd like me to do it after you hear from LBIE.

THE COURT: Well, to what extent is your position congruent with the position of the IRS expressed in papers filed last evening?

MR. MADAN: Well, Your Honor, with respect to the procedural issues that the United States has raised, specifically standing and ripeness, we're not as interested in standing on those formalities because our objective is to obtain this information as efficiently and easily as possible, and while perhaps formally speaking, LBIE does not necessarily have standing to come here, I can understand the issues that they have, and we just don't necessarily need to stand on the formality of whether they have standing or not. I think their expression of the challenges they've faced is reasonable.

THE COURT: Okay. This is an unusual circumstance, inasmuch as I have ongoing responsibility for discovery, but I do not have the ability to deal with the deadline that is

driving the train at the moment. Reading everybody'd papers, it appears that there seems to be consensus that the material which you're seeking and that the IRS is seeking is necessary for the prosecution and the defense of the litigation, that the March 30 deadline is looming, that the burdens alleged by LBIE in complying with the discovery requests appear credible, at least as supported by the witness statements, and that you all have a problem.

MR. MADAN: I agree with everything the Court has just articulated, and I'll say --

THE COURT: Of course, that doesn't mean that I have a problem.

MR. MADAN: No, no. That's typically how it works. But what we've talked to the United States about and frankly with LBIE's counsel about is that we have -- because of all the reasons you've just identified, we have the intention to file a request for an extension of time with respect to the discovery cutoff, and to do it fairly expeditiously --

THE COURT: Let me cut through what you've just said and say something which I think is in the mind of the average judge who reads a discovery argument that says it's going to take us four months to get this information, maybe more. And a reaction to that may be -- and I realize it isn't you who said this -- oh, come on. Why should it take four months? Just put more people on it. Why shouldn't it take two weeks? Haven't

we all heard the litany of, well, it's in deep storage. We don't have control. We have lots of problems. We have other priorities. It's going to be expensive. So?

So my attitude basically is going to be -- because this seems to be relevant information and whether or not LBIE has standing, I'm certainly going to hear them. Arguments about how difficult or time consuming this is or arguments I think are properly to be addressed to the Court in the UK, or to Judge Berman who set the schedule. So my very narrow inquiry is to what extent is the material that Lehman seeks and the IRS seeks information which is properly discoverable? The answer seems to be yes, so for me, this is a relatively easy argument, unless somebody wants to complicate it.

MR. MADAN: You're not going to hear that from me, Your Honor.

THE COURT: Okay. And I'll hear from the IRS, too, and I'm interested in the problems presented by the LBIE position, but I'm not sure that there's much I can do about that. So what does the IRS have to say?

MR. BODING: Good afternoon, Your Honor. Nick Boding for the United States of America and the IRS.

Essentially, Your Honor, the government agrees wholeheartedly with what you just said. I mean, we are in, in some ways, a Catch-22. I don't think anyone disputes that we desperately need this information, particularly the government

to mount its defense in this case, keeping in mind it was the one that was sued, not the one bringing the suit, and all of the information is possessed by a former entity within LBHI that's, for purposes of bankruptcy, two separate entities. So at the end of the day, I think we all agree we need the information, and we all agree it's going to be really hard to get that information by the existing deadline. But with respect to the objections from LBIE, I think they can be answered in one very simple sentence. This isn't the right forum.

All of their objections can be dealt with in the United Kingdom, and we have told them before we are interested in not having that litigation. That will only protract things unnecessarily. We're more than happy to work with LBIE in narrowing whatever requests they identify and addressing problems so that we can both avoid litigating in the United Kingdom. In submitting the instant request to Your Honor, prior to doing so, the United States spent considerable time and resources engaging foreign counsel. Foreign counsel in the United Kingdom has in fact vetted this request, and at this time, we have no reason to believe that it's not consistent with -- or arguably consistent with United Kingdom law.

So in short, we're making a good faith request. We have every reason to believe it will be approved, and essentially we ask that the Court approve the request promptly

so that we can get moving over in the UK and see where things go from there.

THE COURT: Okay.

MR. HESSLER: Good afternoon, Your Honor. My name is Paul Hessler. I'm with Linklaters. I appear on behalf of Lehman Brothers International Europe, LIBI, in this matter in support of its special appearance in this adversary proceeding. Your Honor, I've heard your comments. LIBI wants to emphasize it's not here to obstruct. It's not here to create problems. It's here for a very simple reason, which is that the letter of request that you are asking -- you are being asked to issue asks the English Courts to issue an order with which LIBI cannot comply, and I --

THE COURT: How do I know that's true?

MR. HESSLER: Your Honor --

THE COURT: And indeed, how would the UK Court know that that's true?

MR. HESSLER: Well, Your Honor, we will submit whatever affidavits, and in fact have submitted declarations to Your Honor detailing the difficulties in --

THE COURT: I understand but, you know, even earlier when I was talking to counsel for Lehman, I was hypothesizing what a judge -- not necessarily me --

MR. HESSLER: Sure.

THE COURT: -- a judge might think in seeing a

discovery dispute like this. It's not the first time that judges have heard parties who are asked to turn over documents say we can't do it. It's really hard to do. It's really impossible. We can't make the deadline. And you know something? When a court order is issued, things get done. And it's not that it's impossible. It's difficult. That's all, right? It's just difficult.

MR. HESSLER: Your Honor, of course --

THE COURT: That's my questions.

MR. HESSLER: Of course that's true.

THE COURT: It's difficult, but it's doable.

MR. HESSLER: It's -- the --

THE COURT: It's doable with enough people. Work on it instead of working on something else.

MR. HESSLER: Your Honor, and that certainly is true and could be said of anything in life. The problem is here we have an administration with administrators who have a massive estate to wind up. You're not unfamiliar with the types of problems they have --

THE COURT: I'm very familiar with the types of problems.

MR. HESSLER: -- and lots of issues they're dealing with.

THE COURT: But I guess here's the point -- and you're in an awkward spot because, effectively, they're arguing that

the Bankruptcy Court is not the right court to be deciding a question which will ultimately be decided in the UK, assuming the motions are granted, and I'm also not the right judge to be deciding how much time this should take because of the awkward procedural status of this adversary proceeding, which is unique, in my experience, in having discovery still with me but discovery deadlines elsewhere, which means I have virtually no discretion in this matter other than to consider whether or not the motions state a good claim for discovery from you in the UK, and they appear to.

MR. HESSLER: And Your Honor, other than around the edges on certain requests and particularly with respect to the IRS's motion, that's almost certainly correct. That's almost certainly right.

THE COURT: So what left is for me to do, other than grant the motions?

MR. HESSLER: Well, I agree there's an awkward procedural posture here, given the fact that another judge has set a discovery deadline that is driving this. And in fact, if we were in front of that judge, what I might say to that judge would be -- actually, particularly as to LBHI's request, there is no need for anything. What they -- the last thing they need is the issuance of a letter of request. What they need is an extension of the deadline, and I understand that that's not before Your Honor today, but it is a simple fact that we are

working today, and my client is working today to get the information together, to vet it, to make sure it's in the right form to produce it, to gather information. And so there's really no dispute here about whether the information is discoverable and whether we will or will not produce it. We will, and I assure Your Honor that the difficulties, which I understand must seem like you've heard it from every person who's ever gotten up to protest a discovery demand, are formidable here -- and I don't mean to argue that point, but there's a massive amount of data that has to be cross-checked twice. I don't want to waste your time going over that.

THE COURT: And I accept the representations that have been made that this is time-consuming and difficult. And it appears from the statements made by Lehman here that there's a recognition that this is difficult and time-consuming. And I also know from experience in this case generally and in the bankruptcy, more particularly, that the transition services agreement and the amended services agreement and the sharing of information has a long history and that this is but one example of an ongoing problem. But that having been said, you have a discovery schedule I didn't create, and you have to deal with it.

MR. HESSLER: I agree with that. And fundamentally, Your Honor, we were here for a very limited purpose, was to suggest to Your Honor that rather than shoving off the ship

that may have some leaks and may lead to litigation and costs in the UK and costs to the parties and to the court system in the UK, that we take -- that the parties, rather than courts, take a week or so, see what they can hammer out in terms of required requests, and submit an agreed order.

And part and parcel, Your Honor, it seems to me the parties ought to be in front of Judge Berman seeking extension. That's not my place to argue. I have no dog in that fight, other than insofar as it may lead to the issuance of a UK court order that, I think in all candor, Your Honor, we will have to appear and object to, to the extent that requires production sooner than my client can physically make it. And so really we were just here today to try to save cost, time and effort for everybody involved by doing a little bit of preplanning now, ideally coupled with relief that I understand Your Honor can't give about the discovery deadline, in order to avoid greater costs down the road. And Your Honor, it's really that simple. I mean, we have no desire to be obstructionist or anything else here. It's --

THE COURT: I understand. I don't view your papers or your limited appearance as in any way obstructionist, but I'm granting the motions, and I'm going to do so in whatever manner the movants wish me to do it, and by that, I mean as follows. If the movants wish to take up your proposal of spending some time to craft a custom-made discovery protocol for the

materials that you will voluntarily produce and in effect consent to a court order in the UK providing for that discovery, that might be very efficient. And if the parties want to take a few days or however long it takes to do that within reason and submit an agreed order, that's perfectly acceptable to me.

If, however, the parties believe that it would be more efficient to simply grant their motions with whatever forms of order they wish to submit without conferring with LBIE but agree that notwithstanding that, they will work with you in good faith and endeavor to come up with a discovery protocol that makes sense based upon their perceived needs and the potential burdens on you, as well as the ability to perhaps expedite discovery by streamlining requests, that would be a perfectly acceptable alternative to me, as well.

Additionally, since no one is under any obligation to reach an agreement on this subject as a result of these comments, the parties can simply take their orders and deal with the consequences of those orders in the UK, which may not be the most efficient approach, but it's certainly an alternative. As for what happens with the discovery deadline which is driving this, that's entirely up to the parties, and if they seek more time from Judge Berman, it's something you can seek in the ordinary course. And I take no position one way or the other as to whether or not that's a request that

will be warmly greeted by the District Court. It's entirely up to his discretion. Those are the alternatives, it seems to me.

MR. HESSLER: Thank you, Your Honor.

MR. MADAN: Your Honor, may I?

THE COURT: Yes.

MR. MADAN: We -- should we express which --

THE COURT: Well, this is an open, public hearing. I'd be interested in your reactions to what I've said.

MR. MADAN: Yeah. From LBHI's prospective, I think we would prefer what I think is option two, which is for this Court to issue the order and for us then to work with LBIE to narrow the request. And that's primarily due to the fact that we have this discovery deadline, and we want to get on with it. That is -- we will clearly take LBIE up on its offer to make the process as efficient as possible, but I think we can do that after the fact, just as well as we could before the fact.

THE COURT: And what does the IRS say?

MR. BODING: Your Honor, I believe the government would take the same position. I think it might be easier, given the peculiar nature of the discovery schedule, to go ahead and get the order signed today. I think the government will be more than happy over the next week to work with LBIE in an effort to streamline it, and if we're able to come to an agreement, we'll withdraw the request in the UK, issue a new request, get it approved quickly, and go back on consent. But

I think, given the discovery schedule, we need to get the orders filed in the UK promptly and start moving that process forward, recognizing, as we explained to LBI before, it would be perfectly reasonable a week or two down the road if we can agree on a subsequent request to narrow it, to withdraw the earlier request and submit a new one on consent. That would be something that I think would be very easy to do and would put, I think, both the government and LBHI in the best possible position to both obtain relevant needed evidence and comply with the District Court's existing scheduling order.

THE COURT: Okay.

MR. MADAN: Your Honor, there are sort of two housekeeping matters with respect to the request. One is that we've modified our request slightly to include the United States as a party that would receive notice, and we have a disk and a new order reflecting that. And I believe that, with respect to an objection we filed, with respect to the United States' request, specifically permitting us to review documents from LBIE for privilege, we have agreed upon language to address that concern, which the United States --

MR. BODING: Yes.

MR. MADAN: -- is prepared to submit.

MR. BODING: That's correct, Your Honor. We have an updated request, and it reflects only a resolution of the objection issue. It contains no new information or requests.

We've got that on hard copy, as well as on a disk.

THE COURT: Okay. Well, hearing that both Lehman and the government have revised forms of order and are in agreement that it would be most expedient for those orders to be entered promptly, I will do that. And based upon the colloquy this afternoon, I understand that notwithstanding the fact that these orders are being entered, that there is to be a good faith effort to work with LBIE to streamline the requests or limit them in some fashion so that they can be presented consensually in the UK and presumably expedite the discovery process. It's unclear to me based upon what has been said whether the parties intend to seek any extensions of the discovery cutoff. I don't need to hear that on this record, and I presume that the parties will do whatever they think is appropriate.

MR. MADAN: Thank you, Your Honor.

THE COURT: Okay.

MR. BODING: Thank you, Your Honor.

THE COURT: So that takes care of this, and please hand forward the orders so that we can enter them.

(Pause)

THE COURT: A surprisingly large number of people were interested in this question. Please proceed.

MR. MILLER: Your Honor, Ralph Miller again for the debtors. The last two items that are going forward this

afternoon both have to do with motions to intervene in Lehman Brothers Special Financing Inc. against the Bank of New York Mellon Corporation, adversary Case Number 10-03545, and we would now turn it over to the counsel for the movants for their presentation.

MR. GLENN: Good afternoon, Your Honor. Andrew Glenn, Kasowitz, Benson, Torres and Friedman on behalf of various Noteholders under the Dante program with LBSF. Your Honor, we are here today to recover on behalf of our clients the amounts we believe are owed under a synthetic collateralized debt obligation, either by settlement or by litigation. This dispute, the adversary proceeding in which we seek to intervene, involves one discrete issue, and that issue is the priority of distributions from that CDO. Both the Noteholders and LBSF are the beneficiaries of the collateral that was posted to secure obligations under the CDO, the Bank of New York as the trustee.

Various Noteholders have commenced litigation in the United Kingdom with respect to this issue directly against the Bank of New York, and LBSF has intervened in that action to argue some of the issues that are currently before Your Honor. All we are seeking by this application, Your Honor, is the status that LBSF was granted in the United Kingdom and the context of that litigation in this litigation, and that is to have a say in the ultimate disposition of this matter, which

directly, on a dollar by -- for dollar basis impacts our recoveries under the CDO. The first issue, preliminary matter, is the stay order that Your Honor has entered. Lehman argues that we are precluded from even making this application to intervene today or moving to the extent there's a stay against us to file this motion to intervene. And with all due respect, we disagree with that.

The order was served on the defendants in the adversary proceedings because they were the parties to the proceedings that were stayed. We are not parties to those lawsuits, and all we seek is to become parties to those lawsuits, and then we'll obviously have to deal with the stay order. But to the extent that the stay order is read to mean that we can't come into court at all to file a motion, to have our voices heard in this litigation, to intervene, we believe is inappropriate under the terms of the stay order itself, but in any case raises serious prior restraint constitutional issues.

THE COURT: Before we leave this issue you've just identified, I have a question for you. Because even before I read the debtor's papers that identified the stay and suggested that your motion was premature and that I shouldn't even consider it until after July, it raised in my mind a question, which is why you're here now. What is your objective? Is it to intervene and then seek generalized relief from the stay, or

is it to intervene in a timely way so as not to be charged with having been derelict in moving promptly for intervention, or is it to become involved in some fashion in the alternative dispute resolution procedures that we spent a lot of time talking about this morning? I don't know if you were here or not, but it occupied much of the morning. I bring this up because I can't understand why I should be involved in reactivating or taking any positions with respect to litigation generally stayed, particularly when that litigation may be subject to alternative dispute resolution procedures that, if successful, will make the entire litigation moot.

MR. GLENN: Two responses to that, Your Honor. We are happy to participate in the ADR. I believe that we are not subject to the ADR procedures because we're not party to this litigation. But we also want this issue resolved.

THE COURT: Why?

MR. GLENN: It impacts the timing of our recovery. It impacts the status of the UK litigation. LBSF is --

THE COURT: How does your intervention here affect the status of the UK litigation?

MR. GLENN: Because the LBSF parties are using Your Honor's decision as the state of the art to define the bankruptcy issues that are being considered in the UK court. And the status before was that the Perpetual litigation was addressing that, and the chain of events that led us to where

we are today is that Perpetual was litigating. When that matter was to be resolved, we asked Bank of New York to continue that litigation on behalf of other holders so that the train would keep on moving. And what we believe is a one-issue discrete issue of law that's already been briefed in the District Court -- we don't want to rebrief it -- and I'm sure will go to the Second Circuit. I think that the problem with the stay is that while we're happy to engage in settlement negotiations, the stay is being used as a shield and a sword against us, that the argument is you'll never get back into court or that we'll gain a strategic advantage against you, because Your Honor's decision is the state of the art in the UK. And there is at least a risk that the UK courts will conclude that Your Honor's decision is the be-all, end-all concluding event on this decision.

THE COURT: You mean you don't think it is?

MR. GLENN: Unfortunately, we don't. We don't. So I think that we've had some settlement negations, to be candid with Your Honor, with LBSF. We're not going to stand on ceremony to stop those settlement negotiations. We're happy to participate in the ADR as long as we are given standing and allowed to intervene in the litigation. And yes, I think it's a strong possibility that we will seek to continue the litigation exactly where Perpetual left off. It's a matter that spans literally hundreds of the series of notes containing

this priority clause, and there really isn't any discovery that needs to be undertaken, in our view. I haven't heard Lehman make an argument to the contrary. And I think that, obviously for our parochial interests, we want that decision rendered on a final basis so we can decide how to move forward.

If we're going to settle the matter between now and then, just like any litigation, we'll continue those discussions. I actually think that the Perpetual matter is sort of emblematic of how this process will succeed and sort of what Your Honor just talked about with respect to the discovery dispute. People need deadlines. They need a threat of something happening to give them the impetus to settle these matters. The Perpetual settlement, as I understand it, is still sealed. No one knows what that settlement was. I'm not moving to unseal it. I'm just noting for the record that there is a lot of uncertainty about how this process is going to unfold, and I would respectfully submit that if this litigation got on track, again I think that would facilitate settlement rather than inhibit it.

No one has come into court before Your Honor, to the best of our knowledge, before today to intervene in any of these litigations on this discrete issue. It was a one-off matter involving Perpetual. Given the overlapping nature of that issue across hundreds of litigations -- and I'm guesstimating that -- I just don't see any harm in having that

discrete legal issue decided, particularly because the issues have been vetted already in the District Court, and they were already right for decision.

THE COURT: Let me be clear on something. Are your clients Belmont Noteholders?

MR. GLENN: They are included in the Belmont notes, but they also own Beryl and Saphir as well, I believe.

THE COURT: Okay. Did your clients have a capacity, if they chose to exercise the right, to intervene in the Perpetual litigation?

MR. GLENN: Do they have the capacity? We tried to intervene in that litigation, Your Honor, right before it was settled, and our fear was that that would become collateral estoppel or res judicata against us, and we arrived at a settlement, I believe that was announced in court, that that litigation would terminate without affecting our rights under principles of res judicata, Your Honor.

THE COURT: I remember you filed an objection to the Perpetual settlement that was seeking to avoid preclusive impact.

MR. GLENN: That's correct.

THE COURT: Do I remember that correctly?

MR. GLENN: That's correct.

THE COURT: Okay. Those are my questions. Thank you.

MR. GLENN: Thank you. So moving, Your Honor, to the

merits, if I might, I think we have three discrete arguments for intervention. The two prongs of mandatory intervention -- and I'll try to not belabor the record because this is all in our papers. Number one, we believe that under the context of this case, that we are parties in interest under Section 1109, which gives us a mandatory right to intervene without more, because that's an unconditional right.

We've cited Judge Lifland's decision in Johns-Manville, and there are many cases that go into this. For the notion that the definition of a party in interest is elastic and made on an ad hoc basis, depending on the issues that are before the court, and that applies with equal force to adversary proceedings. As I said at the offset -- and I don't think there's any real dispute about this -- we are the economic parties in interest to this litigation. If our view of the priority scheme and the waterfall prevails, there is a dollar-for-dollar increase in LBSF's recovery. If Your Honor's decision holds up, then they come first, and there's a dollar-for-dollar decrease in our recovery. We are bound by the same principle trust deed, supplemental trust deed and related swap agreements. So given that in Johns-Manville, Judge Lifland appointed representatives of future potential creditors, I think that our connection to this bankruptcy estate and that outcome of this litigation is just as direct, if not more direct, than in Johns-Manville.

Lehman cites two cases for the notion that we're not parties in interest, the Comcoach case and the Revco case. In Comcoach, you had a landlord attempting to foreclose against a third party. The debtor was a tenant of the building in which the foreclosure action stood. And the Court held that that was just simply too tenuous. Obviously, there was no dollar-for-dollar connection in that lawsuit such as there is here.

In Revco, you had an investment fund that settled a preference action with the bankruptcy estate. There, there was no contract where the investors of the investment fund who attempted to intervene were party to in conjunction with the bankruptcy estate. So there was a more significant distinction there.

Going to the second prong briefly of mandatory intervention, I think we've addressed the timeliness issue in our papers very clearly. This case, but for the stay, there would be no issue at all that our application is timely. The litigation has literally not really gotten off the ground. And even because of the stay it can't get off the ground.

So in our view, there's no prejudice at all if we intervene at this time. And nor do we believe for the reasons I articulated that there's any prejudice to anyone because the legal issues involved in this case have already been vetted to a significant degree and overlap with other stakeholders. So if we advance this litigation or we settle it as parties, we

believe both those alternatives would benefit everyone and prejudice no one.

We've shown our substantial interest in the outcome of this litigation. If we win, we get the money. If they win, they get the money. It's really as simple as that.

And I think there's going to be some argument about the structure of the CDO and to show how attenuated we are from the collateral that's to be distributed. And I want Your Honor to understand simply one thing. While the CDO is very complicated, they are swap transactions that are embedded in it.

Ultimately what you have here is a relatively simple collateral trust. BNY holds the collateral and ultimately is collateral trustee. A determination has to be made if it's going in this direction to the estate or in this direction to us. It's really as simple as that.

And finally, adequate representation. Lehman argues that we are adequately represented by BNY, our common trustee. And we, with all due respect, disagree with that.

First of all, BNY is not objecting to this relief. Number two, BNY is a defendant in our litigation in the U.K. And finally, and I think this is very important, BNY is trustee across tens if not hundreds of these CDOs. So while it represents us in this CDO, it represents other people with whatever divergent interests they might have, which is one of

our concerns about why BNY is moving, in our view, very slowly and has not moved to lift the stay or to move the litigation forward.

The case law indicates that the burden of proving inadequate representation is minimal. There are cases that say that if there is an exact identity of interest that yes, that is inadequate representation -- or adequate representation I should say. But whereas here there's no dispute that, number one, our trustee is a defendant in litigation commenced by us; it's a defendant in litigation commenced by LBSF both here and in the U.K.

Given potential unknown conflicts of interest between the strategies, the goals of BNY and all these CDOs I think it would be a big mistake to prove -- to presume that BNY, as a matter of law, can adequately represent us in this case. Certainly, it has no economic interest in the outcome of this dispute. It serves merely as a trustee and doesn't hold any of the notes themselves.

Unless Your Honor has any questions of me at this time, I would turn the podium over to Mr. Seligman and reserve some time for reply.

THE COURT: Okay. I have a couple of questions.

MR. GLENN: Okay.

THE COURT: One is who do you really represent here in terms of the notes that drive this process? I don't know if

you represent some selected noteholders or if you represent all the noteholders. I'm assuming you don't represent all the noteholders; is that correct?

MR. GLENN: I don't. I think our denomination is approximately 111 million of Australian dollars across various series.

THE COURT: Across various series. So hypothetically, if I were to say, Mr. Glenn, you make some terrific points here, motion granted, that is, by the way, a hypothetical, what other parties in interest out there will be emboldened by your litigation success today and choose to step in thereby complicating this litigation? Who else is out there focused on the same flip issue which you identified? That's question one.

Question two, BNY acted as the principle party in interest in the Perpetual litigation here in part because Perpetual for its own reasons chose not to participate in this court. They did a perfectly adequate job in representing the noteholders in that case, presented all of the legal issues that I needed to hear and consider. And until somebody tells me I was wrong in the Perpetual case, that's the law.

MR. GLENN: That's correct.

THE COURT: What makes you think on behalf of your clients you can say or do anything different from what has already been done?

MR. GLENN: I think, Your Honor, that we would do

something is the answer. And if BNY were representing us with the same zeal and in the litigation were in the same stage, maybe I wouldn't be here today. I can't answer that question.

But I do know that they're not here today. That this litigation is now I think six months old, maybe five, and nothing has happened. And BNY as of today is subject to ADR procedures that could directly or indirectly prejudice my clients.

So under pain of sanctions issued by this Court, under pain of compromising with a settlement that is not approved by the noteholders, I can't imagine what might happen given where this litigation is versus Perpetual. All I know is that it is in a -- it's in a completely different world than where the Perpetual litigation was. And I'm not privy to the inner workings of what BNY has chosen to do and not to do in the context of this litigation. All I know is where we are today.

THE COURT: Okay. Thank you.

MR. GLENN: Thank you.

MR. SELIGMAN: Good afternoon, Your Honor. David Seligman on behalf of the liquidators of the Lehman Brothers Australia estate.

Your Honor, I'm not going to belabor the points that my colleague, Mr. Glenn, made with respect to the motion. But so I wanted to focus -- I want to highlight a couple points but focus specific on some unique interests that pertain to the

Lehman Brothers Australia estate. And perhaps I can just give you a little bit of background and context in terms of where we are.

As we said -- excuse me for my cold. As we said in the papers, Lehman Brothers Australia estate holds approximately 17 million dollars of notes. But more important than that, the Lehman Brothers Australia entity was placement agent for a significant amount of these Dante notes when they originally issued both as Lehman Brothers Australia and its predecessor company that was acquired by LBHI well before the filing.

There has not been a bar date set in the Australian case yet. However, there have been several hundred million dollars of claims asserted against the estate related to these Dante notes. To date, there's approximately 275 million dollars of claims filed against Lehman Brothers -- against the Lehman Australia estate where LBSF was the counterparty to the swaps claiming all sorts of breach of fiduciary duty fraud, et cetera, in connection with the placement of those notes.

Again, we don't know the full extent because there hasn't been a bar date set. But based upon those claims asserted in the Lehman Brothers Australia estate, the Australian estate has filed contingent proofs of claim in this case for approximately 1.3 billion dollars. It's what they anticipate if there were ultimate claims asserted against them

what they would be. And they did that to make sure that they were complying with the bar date in the United States.

There is also set, Your Honor, for a trial to start actually at the end of this month a class action, which is brought by some of the holders of these notes against the Lehman Brothers estate on these breach of fiduciary duty fraud types of causes of action. There's actually a mediation set for next week, and then the trial starts I believe it's February 28th. And people anticipate that's going to be a four to six-week trial.

There will likely be an initial phase about liability, and then there will be a subsequent phase about damages. And by the way, the question of damages for the Australian judge may include questions of deficiency claims of these -- of the noteholders, which circles back to the question of who will ultimately have priority here.

The class action has been brought on behalf of approximately seventy-five noteholders. And just -- I know Your Honor asked earlier sort of who is -- who are these noteholders. At least with respect to the ones that are part of the class action, they're all local municipalities -- Australian municipalities, charities, et cetera, who purchased these. And their basic allegation is, is that they bought these as, in their view, safe investments, and it turned out not to be safe investments.

So that's where the Lehman Brothers Australia estate is right now. The lion's share of the claims asserted to date in the Lehman Brothers Australia estate case pertain to these Dante notes. If for whatever reason these -- the noteholders had recovered in full and had no claims against the Australian estate, it would reduce the claims in the Australian estate dramatically.

So because of that, Your Honor, the Australian estate is effectively on hold. They can't make any distributions. They can't even begin to understand whatever kind of plan of liquidation they might have because the vast majority of the claims asserted are these contingent claims.

And so from the Lehman Brothers Australia estate's perspective, they have been trying to push the resolution of this issue both because they hold notes and also for the resolution issue. And they have been in discussions -- and I won't reveal any confidential discussions --

THE COURT: Please don't.

MR. SELIGMAN: -- they have been in discussions with both the Dante noteholders as well as LBHI to try and foster potential settlements. And those have been going on for many, many, many months.

THE COURT: Just so I understand the context of those conversations, is that simply informal settlement dialogue or is it subject to a more formal ADR procedure?

MR. SELIGMAN: It's not subject to a formal procedure. It has been informal dialogue occurring periodically, in-person meetings, meetings by phone, et cetera. But it's not been part of a formalized proceeding. But those I can -- those proceedings -- those conversations are definitely crystallized. And by the way, I don't think that the ADR procedures, if they were triggered with respect to these, would necessarily advance the ball because I think people are already talking, and there has been quite a bit of back and forth.

THE COURT: In what respect is your ability as a representative of the Australian estate limited or compromised by your not being a party in this litigation?

MR. SELIGMAN: Well, it's compromised in two ways. Number one, for the same reasons laid out by the dominant noteholders, we are noteholders. Number two, because of all the contingent claims asserted against us, if there's a decision in -- and they're ultimately may be a decision in the U.K.

And my guess, Your Honor, is, is that whatever the U.K. decides, my guess is -- I have no reason to suspect this, but my guess is, is that the Trustee may decide I can't do anything with the collateral until I get clarity in the U.S. So we're going to have, my guess is, to need to engage in litigation here in the U.S. with respect to this adversary one way or the other because I doubt a trustee is going to make

distributions with the -- with a lawsuit pending against it unless something happens that I can't foresee.

So in two ways, as a noteholder and also with respect to the resolution of this issue, it's going to affect what kinds of claims are asserted against us and thereby what kind of claims that we may have as contribution claims against the estate. Your Honor asked -- and so from our perspective, you know, we believe that it's important to get this litigation going.

You know, some of the things that Mr. Glenn has mentioned is, you know, that this matter is an issue of law. It's been fully briefed at multiple levels. Yes, this is not a big deal for people to take the briefs that they've already done and resubmit them, whether they're to Your Honor again and, you know, we know how Your Honor has ruled, or whether they're at an appellate level. My guess is, is that the only way that this issue is going to be resolved is if it goes up the appellate chain in the United States as well as in the U.K.

We did ask Bank of New York to proceed here in the U.S. We did so when the -- officially when the Perpetual litigation was settled. You asked earlier why bring this litigation now. One, people were engaged before in settlement discussions. People were looking at the Perpetual litigation going forward and were looking for that for guidance. There didn't seem to be any reason to pile on, especially from our

state with limited resources to pile on, and wait to see how that was going to resolve itself.

And in terms of why now, as Mr. Glenn mentioned, there does -- there always is clarity of mind when there is deadlines. It is no coincidence that once District Court Judge McMahon allowed the motion for leave to appeal in front of her, we noticed that there was a settlement relatively quickly.

And again, I think, Your Honor, we should get the litigation going in terms of the briefing. It's not going to be burdensome for people to re-file the same briefs that they had and to get the litigation going. Because again, my guess is it's going to have to get resolved one way or the other.

Your Honor asked about the question of sort of floodgates, whether people are going to be emboldened if -- hypothetically if Your Honor were to allow intervention. I don't think so. I think if you would have seen the floodgate issue it would have come in a lot of parties seeking to intervene in the U.K. proceedings, but they didn't because they were waiting to see how that played out. You would have perhaps already seen a bunch of other parties come forward here and seeking to intervene.

I think the people perceive it as a legal issue, and so at the end of the day, you know, I think people realize that the arguments have been laid out. Again, you asked what additional arguments could we make that would maybe change your

mind or something. I don't know that we have any additional arguments. People have laid out the briefs. But again, it's a question of moving the process forward. And we respectfully believe Your Honor, you know, was -- although his law was in error, and if people want to take that up on appeal they should have the ability to take that up on appeal and move that proceeding along.

We did note in Judge McMahon's opinion her statements with respect to, you know, LBHI and the fact that this matter -- that they were resisting the appeal in the U.S. when it was a favorable ruling. But of course, they were happy to intervene in the U.K. where they had a -- you know, where it was a different ruling and they wanted to proceed there. We're simply asking for the same corresponding rights with respect to what LBHI said.

With -- I just want to highlight a couple of points with respect to the legal standard. We've noted the issue of the party of interest issue. You're probably going to hear some arguments from LBHI about the complexity of the transaction and limitations in the documentation. I guess I would say two points about that. As Mr. Glenn laid out, it really is a question of two different parties as beneficiaries of a trust.

And, Your Honor, I just want to remind you I'm quoting from your order in the Perpetual litigation opinion. Your

Honor stated, and I quote, "At issue both here and in the English courts is the priority of payment to creditors --" excuse me, "At issue both here and in the English courts is the priority of payment to beneficiaries, one a noteholder and the other a swap counterparty, that hold competing interests in collateral securing certain credit linked synthetic portfolio notes."

Your Honor also stated, the notes are secured by the collateral, which BNY holds in trust for the benefit of creditors of Saphir, the SPV, including Perpetual as holder of the notes and LBSF as swap counterparty.

I think that lays out clear that we're talking about two groups of constituents who are beneficiaries of a trust. You're going to hear arguments about cases talking about creditors of creditors. That's not the situation here.

With respect to particular language that you make your arguments under the contract, I simply point out that Section 18.1 of the Principal Trust Deed, which was cited by LBHI. First they misquoted it and conveniently left out some specific references implying that no party other than the parties to that document can actually bring an action against the issuer. I think we've laid out in our papers why those documents -- why those provisions don't apply because we're not seeking to intervene to go after the issuer, the SPV.

And if the -- if 18.1 is what they say it says, then

they were precluded from seeking to intervene in the U.K. proceeding as well. So if they're going to live with the language of the documents, they should have to live with them in toto.

The last point I would want to make about Bank of New York as Your Honor raised the point of that they did a sufficient, admirable or appropriate job with respect to the Perpetual action. They settled that action. They know the terms of that settlement, and it is confidential and they have not disclosed it to their holders.

I think they're compromised. We had asked them to proceed in this litigation. They've declined. You've heard them with extensive argument on the ADR procedures. They are being dragged kicking and screaming to deal with this. They want nothing to do with this. They sought to dismiss the Perpetual litigation saying that somebody else was an indefensible party. And they objected to the ADR procedures saying that they have no authority, that they're not the economic party interest and others are, and they just want nothing to do with it. I think given that context, Your Honor, I don't think that they can adequately represent our interests.

THE COURT: I didn't understand that argument. Why can't they adequately represent your interests?

MR. SELIGMAN: I'm just making the point, Your Honor, that to date they've done everything that they can not to

participate or be involved in the -- in this litigation.

THE COURT: The litigation is stayed. The litigation is stayed. Unspoken in your argument is that you are seeking to intervene for the express purpose of opening up litigation which is part of a class of litigation that has been appropriately stayed consistent with the exercise of this Court's discretion, to give the debtors an opportunity to negotiate with counter parties not with noteholders, right?

MR. SELIGMAN: That's correct, Your Honor.

THE COURT: So what you're seeking to do, by your own admission, is not just to intervene to protect interests in this litigation. You're seeking to open up litigation for a parochial interest so you can get it on appeal as quickly as possible to use it wherever you can for your benefit. It's as simple as that. You're economically motivated, correct?

MR. SELIGMAN: Correct, Your Honor. I was not trying to hide the ball in that instance.

THE COURT: Okay. What you're seeking to do is to blow up, for your purposes, litigation which is appropriately stayed until July. What's the reason to do it now?

MR. SELIGMAN: The reason to do it now, Your Honor, is, again, I believe it's going to have to go forward in any event. And we, as fiduciaries of our estate, are trying to move the ball forward with respect to the administration of our estate. And right now, we can't do that while the --

THE COURT: You can do that as easily as picking up the telephone and participating in the negotiations that you quite candidly said were ongoing and did not need an ADR process to move them forward. You can do it yourself. You don't need to know what's in the sealed Perpetual settlement. You can make your own.

MR. SELIGMAN: Well, Your Honor, by the way, we are not seeking to find out what is in the sealed settlement, and that was not -- that's not our intention. We don't want that.

THE COURT: You don't need to activate this litigation to resolve it.

MR. SELIGMAN: Well, Your Honor, I would say that we certainly don't need to activate the litigation to continue to engage in settlement discussions, and we have been doing that, and we will continue to do that. Our point is, is that we believe while those are ongoing, we respectfully submit that the -- that we should be able to intervene and move forward with the litigation.

THE COURT: I understand, but you're not really seeking to intervene for purposes of protecting your interests as noteholder. You're seeking to intervene for purposes of opening up this litigation and making it a platform for appellate advocacy so that you can advance your cause and improve your negotiating position in this and other structures, correct?

MR. SELIGMAN: Correct, Your Honor. But I think -- so I'm not going to -- I'm not hiding the ball. But I think that we have the right that if we want to be able to move forward -- and again, we're not seeking to do anything outside of the four corners of the legal dispute here.

THE COURT: I understand. You're seeking to accelerate this for your own purposes. I get it. Thank you.

MR. SELIGMAN: Thank you, Your Honor.

MR. MILLER: Again, Your Honor, Ralph Miller from the Weil firm on behalf of Lehman Brothers Special Financing, Inc., known as LBSF.

Your Honor has, of course, identified the central flaw with these motions to intervene, which is that they are not based on the requirements of Rule 24 but an effort to gain a tactical advantage, to get in line ahead of everyone else and to essentially threaten, as the Court appropriately put it, to blow up a carefully designed system of case management for their own advantage.

There are at least three reasons, which are separate but related, why these motions should be denied. One of these is purely substantive, and I would like to deal with that first because it drives and explains the other two. One is a mixture of substance and procedure based on the fact that they did not comply with Rule 24(c) by attaching accompanying pleadings, which is no accident because without pleadings, you can't

possibly tell whom they're trying to sue or what they're trying to claim.

And the third issue is this case management question of why it makes any sense for new parties to come and bring all sorts of issues into a proceeding that was filed, as the Court knows, in connection with the avoidance action deadline for limitations at the two-year mark. It contains not only the flip cause issues, but it contains substantial new issues having to do with whether these are avoidable transactions if they did occur as specified in the flip causes. So those are new issues. And as the Court knows, a stay was appropriately entered to allow alternate dispute resolution.

The substantive flaw is that these movants have not and cannot meet their burden to show the elements for either compulsory or permissive intervention under Rule 24 of the Federal Rules of Civil Procedure. They do not have a, "direct, substantial and legally protectable," interest relating to the property or transaction that is the subject matter of the pending litigation.

They may have other litigations on other issues in other parts of the world, but this litigation has to do with a trust deed or a group of trust deeds to which they're not parties. As the Court knows, and I do have a diagram although I don't think we necessarily need the time for this --

THE COURT: Well, let's see it.

MR. MILLER: Pardon me?

THE COURT: Let's take a look.

MR. MILLER: All right, Your Honor. We'll leave it up.

THE COURT: Thank you.

MR. MILLER: Your Honor, this is going to look familiar because you've actually seen variants of this diagram before. As you know, in the upper corner we have the noteholders. And they are actually not all the noteholders, they're just a subset of noteholders. Then we have issuers. Those are the special purpose vehicles, which have swaps with LBSF as counter party. And then there are collateral securities that were purchased, and BNY Corporate Trustee Services Limited acts as the trustee.

If I may adjust here, and I'll come back to the microphone. The trust deed deals with this part of the box. The noteholders are not parties to the trust deed.

Your Honor, I've put up a chart you've seen before. This is the chart that was used in the Minibond motion to dismiss. And as the Court will recognize, tier one is exactly the same structure that we are looking at here. There, the Minibond Series 10 noteholders had a different special purpose vehicle and a different swap with LBSF and they had different collateral. But they had the same situation with regard to the trustees.

We have also passed out a list of excerpts, and those excerpts, Your Honor, deal with the provisions in the trust deed that essentially deny the right of third parties to enforce the trust deed. These are the same provisions that were quoted in the motion to dismiss argument in the Minibond case. They happen to be the principal trustee in Paragraph 19 for the -- for all of these parties and supplemental trustee in Paragraph 12.

And what they do, as the Court will recall from prior arguments, is they specify that a person who is not a party to the principal trustee -- that includes all the movants -- has no rights, whether under the contracts, that's the Rights of Third Parties Act 1999, or otherwise to enforce any of the terms of the principal trust deed except and to the extent if any the principal trust deed expressly provides for that act to apply.

And there are a couple of provisions in the principal trust deed that, Your Honor, have to do with the salutary purpose of making sure that the trustee's lawyers get paid, which allows lawyers and administrative personnel to enforce the trust deed to make sure they get paid. But other than those third parties, the trust deed makes it clear that no third party may bring actions under either the trust deed or the supplemental trust deed.

May I approach, Your Honor?

THE COURT: Yes. Thank you.

MR. MILLER: What we're passing out now, Your Honor, is your ruling on the motion to dismiss in the Wong case. And if you go to the flag in the transcript, and the Court will, of course, remember this, on page twenty-three, there you ruled that LBSF assert, among other things, that the Court should dismiss Counts I through III of the complaint because plaintiff lacks standing at both the Minibond level, that's Tier 1, and the Saphir level, and therefore, the Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b) incorporated in the Federal Rules of Bankruptcy Procedure 7012. The Court agrees.

Then you go through and discuss essentially these same provisions in those trust deeds. And you conclude appropriately noting that there are governance mechanisms that the noteholders are, this is not all in your opinion but this is part of the argument, that the noteholders are essentially in the same position as shareholders in a corporation. Just because some shareholders are unhappy doesn't mean they get to jump into litigation in the name of the corporation. There are mechanisms, including shareholder derivative actions, where under certain circumstances they can say the corporation is not acting properly.

We don't have any allegations of anything like that before the Court in these motions to intervene because, of

course, we don't have any pleadings on what their intervention would be all about. So that ruling by the Court, this Court, was affirmed by Judge Pauley in the district court, and we have his opinion attached. He did allow leave to amend.

But we have a ruling essentially on exactly the same structure that holds that these parties don't have any standing. And because they don't have any standing they, therefore, do not have any interest that is protectable under either 24(a)(1) or 24(a)(2) or 24(b), discretionary intervention.

Now, I'd like to go a little more into the requirement, Your Honor, that they have to attach a pleading. Rule 24 provides expressly that the motion for intervention must be accompanied by a pleading that sets forth the claims or defenses that are going to be asserted. There is no pleading attached. We have no idea what this intervention would be.

They say well, they want to get in and they want to deal with the flip clause. But the truth of the matter is this litigation is much more complicated than the flip cause. And furthermore, these issues that are raised by the liquidator in Australia, it's almost impossible to figure out what the fact that they've got some suits about the placement agent might have to do with the pending litigation.

But the one thing that is clear, Your Honor, and this is one of the requirements of Rule 24 for either permissive or

compulsory intervention, is that an existing party able to protect those -- the interests makes it unnecessary for there to be intervention. And as the Court has recognized, BNY is an existing party that is protecting these interests. It has protected the interests before. It is appropriately respecting the stay. We believe that makes excellent sense and is the appropriate response of a responsible litigant under these circumstances.

The Wong decision, Your Honor, is consistent with decisions in other cases. We have -- there was some mention of the Revco litigation, which is discussed in our brief. An important misunderstanding, I believe by Mr. Glenn, is he said that the Revco case, which had to do with investors and a Cayman investment company, and the investment company had reached a settlement, and the investors came in and tried to assert that they were parties in interest under the Bankruptcy Code. And the Second Circuit found that they were not.

He said that well, they were parties to a contract directly with the debtor. The noteholders are not parties to any contract with the debtor either. They're -- the noteholders have contracts with the issuer. The issuer has a contract with the debtor. There is a trust deed that the noteholders are not parties to. So they are not in any common contractual relationship just as the investors were not in a contractual relationship in Revco. So that is a spot on reason

why they don't have any standing, Your Honor, in addition to your ruling in the Wong case, which is obviously exactly the same facts.

I've already mentioned the pleading requirement. We cite five cases in our opposition for the proposition that not meeting the requirement of attaching a pleading is a reason by itself to deny a motion to intervene because you can't tell what the intervention is about. You can't tell what the claims are going to be.

The difficulty in getting the pleadings straight in the Wong case is in evidence, and the fact that it's been remanded for further proceedings is evidence to the fact that the pleading is critical here. Understanding who is claiming what is critical to deciding whether an intervention is appropriate. So that's a reason to deny the intervention.

And finally, Your Honor, and you've already, of course, touched on this, the stay was put in place because these actions are very complicated to manage. They were filed as a group. This is the case that we call the undistributed case. It deals with a situation in which distribution has not been made. And in all of those, the issuer and the trustee still control the funds. And in those cases, the governance mechanisms are operative. And if enough votes could be put together, then the governance mechanisms could operate and the trustee or the issuer could be made to take certain actions.

The problem is for the Belmont noteholders and for the 17 million dollars worth of sort of scattered notes apparently owned by the liquidator in Australia, they don't have enough votes to affect the outcome, so they're trying to, as you say, blow up the stay proceeding and inject themselves into this action and thereby generate attention. And we believe they are trying to generate leverage.

The problem is that if they succeed, as the Court has already recognized, others are going to want to try to do that. And the entire case management system set up by the stay would unravel.

At some point, Your Honor, the ADR mechanism should operate, and there will be a residue of matters that cannot be resolved. There may well be things like interpleaders that may be started in the course of this. Whatever is left when the stay burns off, it would be possible for people to bring intervention motions without having to worry about the stay.

That is not this time. And one of the requirements of Rule 24, all aspects of Rule 24, is that it must be a timely motion to intervene. This is untimely because as the Court has already recognized it's premature.

So for those three reasons we believe that the motions to intervene should be denied. I'd be happy to answer your questions.

THE COURT: That was a very creative use of the word

untimely.

Okay. Anything in response?

MR. GLENN: Very briefly, Your Honor. We thought we made this clear in our papers. If it's outcome determinative, we would be prepared simply to submit the same motion to dismiss or a very similar motion to dismiss once the action is un-stayed to allow us to do that.

We're obviously in a different procedural posture in this case because of the stay. We were not supposed to even file this motion in their view, so let alone filing the first pleading in a stayed case is obviously a unique --

THE COURT: I don't --

MR. GLENN: -- procedural conundrum.

THE COURT: I don't understand what you mean by filing the same motion to dismiss.

MR. GLENN: The motion for summary judgment, a similar motion for summary judgment that Bank of New York filed with respect to the Perpetual matter, or an answer that asserts that we deny all the allegations of the complaint and we believe that the automatic stay doesn't apply pursuant to Section 560.

But we're in a stayed action so we're obviously in a procedural conundrum that doesn't typically apply in Rule 24(c) questions. We cited cases that courts grant substantial leeway in that regard. And I think that it's appropriate here.

Very briefly, we are bound by the trust deed. So the

notion that we're not parties to the trust deed is I think misleading. We are bound by it. They are bound by it. That was not a factor present in Revco by any means.

The principal trust deed gives Lehman no rights to prosecute any claims either. So all we're seeking here is to the extent that they, in apparent contravention to the trust deed, can't or can bring actions with respect to this avoidance action. We, as the mirror image of them, the counter party, should be granted reciprocal rights.

With respect to Your Honor's concern about leverage and all those things, all we're looking for is a resolution. We're happy, as I said, to continue a settlement dialogue. But the answer to Your Honor's question is this. There is a decision out there that is being used against us as leverage. Okay. And if that is the correct decision, then they have all the leverage against us in the world. Okay.

It's unfair for them to have that hammer and for us to be stayed perhaps for -- until July, longer than that, when all we want is what any litigant wants, which is a resolution of the case, access to the courts if we're permitted to intervene in this action. I don't think there's anything wrong with that.

I think that, as I said earlier, I understand the case management concerns and the like. But as Judge McMahon recognized in her opinion, this is a -- an issue that goes

across all of these series and it implicates serious issues with respect to the securities markets, which is why ISDA and the LSTA filed amice briefs in the district court.

I have nothing further to add. Thank you.

THE COURT: Okay. Do you have anything more?

MR. SELIGMAN: Nothing further, Your Honor.

THE COURT: This is an interesting argument to have on the very same afternoon that followed a lengthy morning contested matter relating to the development of procedures for dealing with alternative dispute resolution in those transactions that involve SPVs. And this morning's calendar probably consumed almost two hours in dealing with just that question. I don't know if it was by design or just bad luck that the movants seeking to intervene ended up on the same day that I spent substantial time dealing with ADR procedures.

It is difficult for me, as I think is apparent from my comments to this point, to see a reason why I should grant these motions now, particularly since these motions unabashedly are less about intervention and much more about opening up stayed litigation and seeking to exercise independent leverage by parties who, at least in the eyes of Lehman, actually have no direct standing here at all.

My decision in the Wong Minibond litigation with respect to standing may or may not be determinative of the issues here. We've simply had argument in which schematic

diagrams have been used to show certain structural overlaps and similarities between the Minibond transactions and the transactions that are at issue in this litigation.

It seems to me that the best and most appropriate way to deal with the pending intervention motion is to deny it in both instances without prejudice, for me to treat the intervention motion as being a Trojan horse for what is really a motion to vacate the stay in a limited manner in respect to this litigation, and that's how I see the motion.

I believe that it is procedurally inappropriate except for extraordinary good cause shown to do anything to disturb the stay, which was originally set for a nine-month period following the commencement of the litigation in September of last year.

One of the things that is very clear, in part, as a result of this morning's on-the-record discussions but also the report that was referenced during those discussions of the success of the ADR program, is that it is impossible to manage the vast number of very significant commercial disputes that are part of the portfolio of adversary proceedings in this case without an effective ADR program.

For that reason, a request that seeks to reactivate one case by non-parties is particularly egregious, particularly where, as is apparent from a reading of the papers filed, and is crystal clear from the colloquy that we've had this

afternoon, the purpose of intervention has less to do with the Rule 24 standards of adequate representation and the need to intervene to protect legitimate rights and much more to do with the desire to parachute into a litigation so as to reactivate it for appellate purposes. Appellate purposes that by the admission of counsel, are designed not necessarily to achieve an outcome in this particular litigation but perhaps across other structures as well.

I have no sympathy for these motions at this point. They're denied without prejudice for the reasons stated. I endorse the arguments that have been made by the debtor's counsel, but I make no determination with respect to standing because I think that's an open question to be determined on fuller briefing.

As to the requirement that there be a pleading, that's the easiest and narrowest way for me to deny the motion. But that's simply too convenient. It's denied for that reason as well, but it's really denied because this sort of litigation, gamesmanship, while understandable is really inappropriate during the period of a stay that is designed to benefit the entire administration of the Lehman cases. That which seeks to take pot shots at a particular litigation within the portfolio, effectively takes pot shots at the entire portfolio.

The stay is beneficial, and I'm going to continue to enforce it. The motion is denied for the reasons stated. And

I'll entertain an appropriate order.

Is there more for this afternoon?

MR. MILLER: We have nothing further, Your Honor. We'll submit an order and a disk shortly.

THE COURT: We're adjourned.

MR. GLENN: Thank you.

MR. MILLER: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 3:40 p.m.)

I N D E X

R U L I N G S

I N D E X (Continued)

R U L I N G S (Continued)

I N D E X (Continued)

R U L I N G S (Continued)

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

Lisa Bar-Leib

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